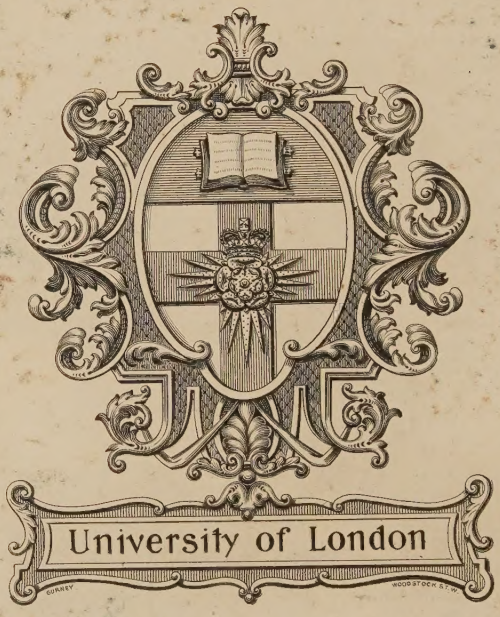
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY


University of London

UND BY WOOD, LONDON.

REFERENCE ONLY

346.4
Mx. North Gall.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. Warmington, Esq., K.C.
Vice-Chairman—F. A. Bosanquet, Esq., K.C.

EX-OFFICIO MEMBERS.

Sir John Lawson Walton, M.P. . . Attorney-General.
Sir William S. Robson, M.P. . . Solicitor-General.
Charles Mylne Barker, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
F. A. Bosanquet, Esq., K.C. W. Pickford, Esq., K.C.	Inner Temple.
C. M. Warmington, Esq., K.C. C. C. Scott, Esq.	Middle Temple.
James Mulligan, Esq., K.C. J. C. Lewis Coward, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams, Knt. (Firm—Messrs. Hollams, Sons, Coward & Hawksley). E. J. Bristow, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1906.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	G. I. FOSTER COOKE, W. LLOYD CABELL, W. COWELL DAVIES, H. B. HEMMING,	*Barristers-at-Law.*
Mr. Justice Kekewich AND Mr. Justice Joyce	G. A. STREETEN, H. B. HEMMING, R. MORRISON,	*Barristers-at-Law.*
Mr. Justice Farwell AND Mr. Justice Swinfen Eady	H. L. FRASER, G. R. ALSTON, J. R. BROOKE,	*Barristers-at-Law.*
Mr. Justice Buckley AND Mr. Justice Warrington	W. COWELL DAVIES, FRANK EVANS, H. C. ROPER, W. IVIMEY COOK,	*Barristers-at-Law.*

1906.—VOL. I.

LONDON:
Printed for the Council of Law Reporting
BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,
And Published
BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1906_1

Lord Loreburn	*Lord Chancellor.*
Lord Alverstone	*Lord Chief Justice of England.*
Sir Richard Henn Collins	*Master of the Rolls.*
Sir John Gorell Barnes	*President of the Probate, Divorce, and Admiralty Division.*
Sir Roland Vaughan Williams	*Lords Justices of the Court of Appeal.*
Sir Robert Romer	
Sir James Stirling	
Sir James Charles Mathew	
Sir H. H. Cozens-Hardy	
Sir J. Fletcher Moulton	
Sir Arthur Kekewich	*Justices of High Court, attached to Chancery Division.*
Sir George Farwell	
Sir H. B. Buckley	
Sir Matthew I. Joyce	
Sir C. Swinfen Eady	
Sir T. Rolls Warrington	
Sir John Lawson Walton	*Attorney-General.*
Sir William S. Robson	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
99	9 from bottom	deduction	declaration
148	16 (head-note)	*In re Estate of Wyoming Syndicate.*	*In re State of Wyoming Syndicate.*
507	last two lines	Tippetts & Wall	J. W. Wall.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1906, will be as follows :—

In the First Series,
[1906] 1 Ch. [1906] 2 Ch.

In the Second Series,
[1906] 1 K. B. [1906] 2 K. B. [1906] P.

In the Third Series,
[1906] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
African Farms, Ld., *In re* –	640
Alfred Melson & Co., Ld., *In re*	841
Allcot, Cole *v.* *In re* Friend's Settlement – – – –	47
Alsop's Patent, *In re.* (C.A.)	85
Assheton Smith *v.* Owen (C.A.)	179
Attorney-General *v.* Manchester Corporation – – –	643
——— *v.* Mersey Railway Company – – –	811
——— *v.* North Eastern Railway Company – –	310

B.

Badische Anilin und Soda Fabrik *v.* Isler – – – – –	605
Barry *v.* Smart. *In re* Barry's Trusts – – – –	768
Barry's Trusts, *In re.* Barry *v.* Smart – – – –	768
Benett, *In re.* Ward *v.* Benett (C.A.)	216
——— Ward *v.* *In re* Benett (C.A.)	216
Bigg, Moore *v.* *In re* Moore –	789
Bisgood *v.* Nile Valley Company	747
Blew, *In re.* Blew *v.* Gunner –	624
—— *v.* Gunner. *In re* Blew –	624
Bomore Road (No. 9), *In re* –	359
Bonnard *v.* Dott – (C.A.)	740
Boschoek Proprietary Company, Ld. *v.* Fuke – – –	148
Bourne, *In re.* Bourne *v.* Bourne	113
——— Davey *v.* Bourne (C.A.)	697
——— *v.* Bourne. *In re* Bourne	113
———, Davey *v.* *In re* Bourne (C.A.)	697
British Power Traction and Lighting Company, *In re.* Halifax Joint Stock Banking Company *v.* British Power Traction and Lighting Company –	497

PAGE

British Power Traction and Lighting Company, Halifax Joint Stock Banking Company *v.* *In re* British Power Traction and Lighting Company– – 497

C.

Calgary and Edmonton Land Company, *In re* – – – 141
Carlish *v.* Salt – – – 335
Chadwick, Vickerstaff *v.* *In re* Vickerstaff – – – 762
Charing Cross, Euston, and Hampstead Railway Company, Lewis & Solome *v.* – – – 508
Clark, *In re* – – – – 615
Clayton, Peat *v.* – – – 659
Cole *v.* Allcot. *In re* Friend's Settlement – – – 47
Cording (J. C.) & Co., Ld. *v.* Westminster Corporation – 464
Crigglestone Coal Company, *In re.* Stewart *v.* Crigglestone Coal Company – – – 523
———————, Stewart *v.* *In re* Crigglestone Coal Company – – – 523
Cuthbert, Young *v.* – – 451

D.

Davey *v.* Bourne. *In re* Bourne (C.A.) 697
Davies *v.* Witts. *In re* Hole (C.A.) 673
Davy *v.* Scarth – – – 55
Dawson *v.* Isle – – – 633
Denman (J. L.) & Co., Ld. *v.* Westminster Corporation – 464
Dent, Macmillan & Co. *v.* – 101
Derbyshire, *In re.* Webb *v.* Derbyshire – – – 135
———————, Webb *v.* *In re* Derbyshire – – – 135
Dodsworth, Smith *v.* *In re* Smith 799
Dott, Bonnard *v.* – (C.A.) 740
——, Victorian Daylesford Syndicate, Ld. *v.* – (C.A.) 747, n.

PAGE

Dunsany, Nott *v.* *In re* Dunsany's Settlement (C.A.) 578
Dunsany's Settlement, *In re.* Nott *v.* Dunsany – (C.A.) 578

E.

Edwards, *In re.* Jones *v.* Jones (C.A.) 570
English Electro-Metallurgical Company, Ld. *v.* Glasdir Copper Mines, Ld. *In re* Glasdir Copper Mines, Ld. (C.A.) 365

F.

Farnborough, *In re* Trusts of Land at – – – – 361
Friend's Settlement, *In re.* Cole *v.* Allcot – – – – 47
Fuke, Boschoek Proprietary Company, Ld. *v.* – – – 148
Fuller *v.* White Feather Reward, Ld. – – – – 823

G.

Gaskell and Walters' Contract, *In re.* – – – – 440
Gilbey *v.* Rush – – – 11
——, Villar *v.* – (C.A.) 583
Gill, Wrigley *v.* – (C.A.) 165
Gist, *In re.* Gist *v.* Timbrill – 58
—— *v.* Timbrill. *In re* Gist – 58
Glasdir Copper Mines, Ld., *In re.* English Electro-Metallurgical Company, Ld. *v.* Glasdir Copper Mines, Ld. (C.A.) 365
———————, English Electro-Metallurgical Company, Ld. *v.* *In re* Glasdir Copper Mines, Ld. (C.A.) 365
Gonville and Caius College, Cambridge and Metropolitan Railway Company, *In re* – 619, n.
Gorringe, *In re.* Gorringe *v.* Gorringe – – – – 319

PAGE

Gorringe *v.* Gorringe. *In re* Gorringe – – – – 319
Gosselin, *In re.* Gosselin *v.* Gosselin – – – – 120
——— *v.* Gosselin. *In re* Gosselin – – – – – 120
Gould, Mackay *v.* *In re* Mackay 25
Grant, Ray *v.* *In re* Rattenberry 667
Grant, Bulcraig & Co., *In re* – 124
Griffiths *v.* Vezey – – – 796
Gunner, Blew *v.* *In re* Blew – 624

H.

Haden and Jackson's Contract, *In re* – – – (C.A.) 412
Halifax Joint Stock Banking Company *v.* British Power Traction and Lighting Company. *In re* British Power Traction and Lighting Company – – – – – 497
Hammersmith Corporation, Thompson *v.* – – – 299
Harness, Major *v.* *In re* Oddy (C.A.) 93
Haskell Golf Ball Company *v.* Hutchison – – – – 518
Herts, Hooper *v.* – (C.A.) 549
Hole, *In re.* Davies *v.* Witts (C.A.) 673
Holliwell *v.* Seacombe – – 426
Hooper *v.* Herts – (C.A.) 549
Horne *v.* Horne (W. C.) & Sons, Ld. *In re* W. C. Horne & Sons, Ld. – – – – 271
——, Quinion *v.* – – – 596
—— (W. C.) & Sons, Ld., *In re.* Horne *v.* Horne (W. C.) & Sons, Ld. – – – 271
Hugh, Whitehouse *v.* – – 253
Hutchison, Haskell Golf Ball Company *v.* – – – 518

I.

Isle, Dawson *v.* – – – 633
Isler, Badische Anilin und Soda Fabrik *v.* – – – – 605

J.

PAGE

Jackson and Haden's Contract, *In re* – – (C.A.) 412
Jones *v.* Jones. *In re* Edwards (C.A.) 570
Judd and Poland and Skelcher's Contract, *In re* – (C.A.) 684

K.

Kekewich, Stucley *v.* *In re* Stucley – – (C.A.) 67
Kempster, *In re.* Kempster *v.* Kempster – – – – 446
——— *v.* Kempster. *In re* Kempster – – – – 446

L.

Leeds Forge Company, North Eastern Marine Engineering Company *v.* – – – 324
Le Roi Mining Company, McMillan *v.* – – – 331
Lewis & Solome *v.* Charing Cross, Euston, and Hampstead Railway Company – – 508
London United Tramways Act, 1900, *In re* – – – 534
Loosemore, Murch *v.* *In re* Tuck – – (C.A.) 692
Loveland, *In re.* Loveland *v.* Loveland – – – – 542
——— *v.* Loveland. *In re* Loveland – – – – 542

M.

Mackay, *In re.* Mackay *v.* Gould 25
——— *v.* Gould. *In re* Mackay 25
McLaughlin *v.* Penny. *In re* Pardoe – – – – 265
McMillan *v.* Le Roi Mining Company – – – – – 331
Macmillan & Co. *v.* Dent – – 101
Major *v.* Harness. *In re* Oddy (C.A.) 93
Manchester Corporation, Attorney-General *v.* – – 643

PAGE

Manchester Corporation *v.* New Moss Colliery, Ld. – – 278
Melson (Alfred) & Co., Ld. *In re* 841
Mercantile Lighterage Company, *In re* – – – – 491
Mersey Railway Company, Attorney-General *v.* – – 811
Metropolitan Railway Company and Gonville and Caius College, Cambridge, *In re* – 619, n
Milner *v.* Walbran. *In re* Walbran – – – – – – 64
Molyneux *v.* Richard – – 34
Moore, *In re.* Moore *v.* Bigg – 789
——— *v.* Bigg. *In re* Moore – 789
Morgan, Williams *v.* – – 804
Murch *v.* Loosemore. *In re* Tuck (C.A.) 692

N.

New Moss Colliery, Ld., Manchester Corporation *v.* – – 278
Nile Valley Company, Bisgood *v.* 747
Nisbet and Potts' Contract, *In re* (C.A.) 386
North Eastern Marine Engineering Company *v.* Leeds Forge Company – – – – 324
North Eastern Railway Company, Attorney-General *v.* – – 310
Nott *v.* Dunsany. *In re* Dunsany's Settlement (C.A.) 578

O.

Oddy, *In re.* Major *v.* Harness (C.A.) 93
Offin *v.* Rochford Rural Council 342
Owen, Assheton Smith *v.* (C.A.) 179

P.

Pardoe, *In re.* McLaughlin *v.* Penny – – – – 265
Parker's Policies, *In re* – – 526
Paton, Stackemann *v.* – – 774
Peat *v.* Clayton – – – 659

PAGE

Penny, McLaughlin *v.* *In re* Pardoe – – – – 265
Pollock, *In re.* Pollock *v.* Pollock 146
——— *v.* Pollock. *In re* Pollock 146
Polsue & Alfieri, Ld., Rushmer *v.* (C.A.) 234
Potts and Nisbet's Contract, *In re* – – (C.A.) 386

Q.

Quinion *v.* Horne – – 596

R.

R., *In re* – – (C.A.) 730
Rattenberry, *In re.* Ray *v.* Grant 667
Ray *v.* Grant. *In re* Rattenberry 667
Richard, Molyneux *v.* – – 34
Rickett *v.* Rickett. *In re* Sharp 793
Rochford Rural Council, Offin *v.* 342
Rowe's Trustee's Claim. *In re* West Coast Gold Fields, Ld. (C.A.) 1
Rush, Gilbey *v.* – – – 11
Rushmer *v.* Polsue & Alfieri, Ld. (C.A.) 234

S.

S. S. B., *In re* – (C.A.) 712
Salt, Carlish *v.* – – – 335
Sampson, *In re.* Sampson *v.* Sampson – – – – 435
——— *v.* Sampson. *In re* Sampson – – – – 435
Scarth, Davy *v.* – – – 55
Seacombe, Holliwell *v.* – – 426
Sharp, *In re.* Rickett *v.* Rickett 793
Sirdar Rubber Company *v.* Wallington, Weston & Co. (C.A.) 252
Skelcher and Judd and Poland's Contract, *In re* – (C.A.) 684
Smart, Barry *v.* *In re* Barry's Trusts – – – – 768
Smith, *In re.* Smith *v.* Dodsworth – – – – 799
——— *v.* Dodsworth. *In re* Smith – – – – 799

PAGE

Stackemann *v.* Paton – – 774
Stanley, *In re.* Tennant *v.* Stanley – – – – 131
———, Tennant *v.* *In re* Stanley – – – – 131
Stewart *v.* Crigglestone Coal Company. *In re* Crigglestone Coal Company – – – 523
Stucley, *In re.* Stucley *v.* Kekewich – – (C.A.) 67
——— *v.* Kekewich. *In re* Stucley – – (C.A.) 67

T.

Tennant *v.* Stanley. *In re* Stanley – – – – 131
Thellusson *v.* Valentia (Viscount) 480
Thompson *v.* Hammersmith Corporation – – – 299
Timbrill, Gist *v.* *In re* Gist – 58
Tuck, *In re.* Murch *v.* Loosemore – – (C.A.) 692

V.

Valentia (Viscount), Thellusson *v.* 480
Valpy, *In re.* Valpy *v.* Valpy – 531
——— *v.* Valpy. *In re* Valpy – 531
Vezey, Griffiths *v.* – – – 796
Vickerstaff, *In re.* Vickerstaff *v.* Chadwick – – – 762
——— *v.* Chadwick. *In re* Vickerstaff – – – 762
Victorian Daylesford Syndicate, Ld. *v.* Dott – (C.A.) 747, n
Villar *v.* Gilbey – (C.A.) 583
Von Luedecke, Whitby *v.* – 783

W.

Walbran, *In re.* Milner *v.* Walbran – – – – – 64
———, Milner *v.* *In re* Walbran – – – – – 64
Wallington, Weston & Co., Sirdar Rubber Company *v.* (C.A.) 252
Walters and Gaskell's Contract, *In re* – – – – – 440
Ward *v.* Benett. *In re* Benett (C.A.) 216
Webb *v.* Derbyshire. *In re* Derbyshire – – – 135
West Coast Gold Fields, Ld., *In re.* Rowe's Trustee's Claim (C.A.) 1
Westminster Corporation, Cording (J.C.) & Co, Ld. *v.* – 464
———, Denman (J.L.) & Co., Ld. *v.* – 464
Whalley, *In re* – (C.A.) 565
Whitby *v.* Von Luedecke – 783
White Feather Reward, Ld., Fuller *v.* – – – – 823
Whitehouse *v.* Hugh – – 253
Williams *v.* Morgan – – 804
Witts, Davies *v.* *In re* Hole (C.A.) 673
Wrigley *v.* Gill – (C.A.) 165

Y.

Young *v.* Cuthbert – – – 451

TABLE OF CASES CITED.

A.

		PAGE
A., In re	[1904] 2 Ch. 328	714
Abadam *v.* Abadam	33 Beav. 475	795
Adams *v.* Lavender	1 M'Cl. & Y. 41	671
Adamson, In re	Unreported	620
Adkins *v.* Bliss	2 De G. & J. 286	693
Agra Bank *v.* Barry	Ir. R. 3 Eq. 443; Ir. R. 6 Eq. 128; L. R. 7 H. L. 135	26
Ainsworth *v.* Wilding	[1905] 1 Ch. 435	169
Albert Life Assurance Company, In re	L. R. 11 Eq. 164	71
Aldis *v.* London Corporation	[1899] 2 Ch. 169	467
Aldridge *v.* Westbrook	4 Beav. 212	219
Alexander *v.* Newman	2 C. B. 122	74
Allen *v.* Allen	10 P. D. 187	694
Allen *v.* Gold Reefs of West Africa, Ld.	[1900] 1 Ch. 656	485
Ambler, In re	[1905] 1 Ch. 697	221
Andrews *v.* Gas Meter Company	[1897] 1 Ch. 361	484
Anstis, In re	31 Ch. D. 596	579
Armstrong *v.* Armstrong	L. R. 12 Eq. 614	3
Armstrong's Patent, In re	14 Rep. Pat. Cas. 747	87
Artisans' Land and Mortgage Corporation, In re	[1904] 1 Ch. 796	142
Ashburner *v.* Sewell	[1891] 3 Ch. 405	415
Ashbury Railway Carriage and Iron Company *v.* Riche	L. R. 7 H. L. 653	312, 815
Ashforth, In re	[1905] 1 Ch. 535	786
Ashley *v.* Ashley	6 Sim. 358	787
Atkinson *v.* Littlewood	L. R. 18 Eq. 595	669
——— *v.* Webb	2 Vern. 478; Prec. Ch. 236	668
Attorney-General *v.* Ailesbury (Marquis of)	12 App. Cas. 672	676
——— *v.* Antrobus	[1905] 2 Ch. 188	258
——— *v.* Aspinall	2 My. & Cr. 613	649
——— *v.* Cole & Son	[1901] 1 Ch. 205	238
——— *v.* Conduit Colliery Company	[1895] 1 Q. B. 301	284
——— *v.* Esher Linoleum Company	[1901] 2 Ch. 647	347
——— *v.* Great Eastern Railway Company	11 Ch. D. 449; 5 App. Cas. 473	312, 313, 648, 813, 814
——— *v.* Great Northern Railway Company	1 Dr. & Sm. 154	312

		PAGE
Attorney-General *v.* Great Northern Railway Company	29 L. J. (Ch.) 794	656
——— *v.* London County Council	[1901] 1 Ch. 781	647
——— *v.* Manchester Corporation	22 Times L. R. 261; [1906] 1 Ch. 643	814
——— *v.* Newcastle-upon-Tyne Corporation	23 Q. B. D. 492	647
——— *v.* North Eastern Railway Company	[1906] 1 Ch. 310	648
——— *v.* Pontypridd Urban Council	[1905] 2 Ch. 441	313
——— *v.* Rochester Corporation	[1867] W. N. 142; 15 W. R. 765	616
——— *v.* Sheffield Gas Consumers' Company	3 D. M. & G. 304	238
——— *v.* Wilson	Cr. & Ph. 1	649
Attorney-General for Ontario *v.* Attorney-General for the Dominion	[1896] A. C. 348	483
Austin *v.* Jackson	11 Ch. D. 942, n.	56
Awdley *v.* Awdley	2 Vern. 192	676

B.

Baggs, In re	[1894] 2 Ch. 416, n.	712
Bailey *v.* Barnes	[1894] 1 Ch. 25	394
Bain *v.* Fothergill	L. R. 7 H. L. 158	430
Bainbridge *v.* Smith	41 Ch. D. 462	148
Baird *v.* Wells	44 Ch. D. 661	485
Ball *v.* Ray	L. R. 8 Ch. 467	238
Baltimore Wharf Case	3 Bland (Maryland, Ch.), 383	195
Bamford *v.* Turnley	3 B. & S. 62	238
Bankes *v.* Small	36 Ch. D. 716	442
Barney, In re	[1894] 3 Ch. 562	801
Barraclough *v.* Brown	[1897] A. C. 615	327
Barrow *v.* Barrow	3 W. R. 587	536
Bartlett *v.* Marshall	44 W. R. 251	240
Basset *v.* St. Levan	43 W. R. 165	122
Bateman *v.* Davis	3 Madd. 98	14
Batten *v.* Wedgwood Coal and Iron Company	28 Ch. D. 317	373, 503
Baxendale *v.* London and South Western Railway Company	L. R. 1 Ex. 137	648, 814
Beale *v.* Beale	1 P. Wms. 244	590
Bear Island Defence Works and Doyle, In re	[1903] 1 I. R. 164	534
Beilby *v.* Raper	3 B. & Ad. 284	196
Belham, In re	[1901] 2 Ch. 52	223
Bell *v.* Ingestre (Lord)	12 Q. B. 317	636
Belmore (Countess) *v.* Kent County Council	[1901] 1 Ch. 873	347
Bence, In re	[1891] 3 Ch. 242	786
Bentley *v.* Bignold	5 B. & Ald. 335	744
Betts *v.* Willmott	L. R. 6 Ch. 239	610
Bevan's Trusts, In re	34 Ch. D. 716	571
Bide *v.* Harrison	L. R. 17 Eq. 76	137
Biggot *v.* Smyth	Cro. Car. 4th ed. 102	786
Bilham, In re	[1901] 2 Ch. 169	47

		PAGE
Bilston (Perpetual Curate of), Ex parte	[1889] W. N. 17; 37 W. R. 460	618
Binns *v.* Nichols	L. R. 2 Eq. 256	265
Birmingham and District Land Company and Allday, In re	[1893] 1 Ch. 342	258
Birmingham Corporation *v.* Allen	6 Ch. D. 284	289
Bisgood *v.* Nile Valley Company	22 Times L. R. 317; [1906] 1 Ch. 747	828
Bishop *v.* Balkis Consolidated Company	25 Q. B. D. 512	663
Bishopsgate Foundation, In re	[1894] 1 Ch. 185; 42 W. R. 199; Seton, 2458	617
Blasson *v.* Blasson	2 D. J. & S. 665; 12 W. R. 396; 13 W. R. 113	583, 586, 587
Blundell *v.* Catterall	5 B. & Al. 268	198
Bolling *v.* Hobday	31 W. R. 9	397
Bolton, In re	31 Ch. D. 542	545
——— *v.* Puller	1 Bos. & P. 539	635
Bonham *v.* Newcomb	1 Vern. 232	806
Booth, In re	[1894] 2 Ch. 282	147
——— *v.* New Afrikander Gold Mining Company	[1903] 1 Ch. 295	830
Bostock *v.* North Staffordshire Railway Company	4 E. & B. 798; 3 Sm. & Giff. 283	312
Botten *v.* City and Suburban Permanent Building Society	[1895] 2 Ch. 441	485
Boucas *v.* Cooke	[1903] 2 K. B. 227	776
Boughton *v.* James	1 Coll. 26	786
Bowman *v.* Hyland	8 Ch. D. 588	413
Brandy Distillers Company, In re	[1901] W. N. 37	641
Branmer's Estate, In re	14 Jur. 236	616
Bree *v.* Perfect	1 Coll. 128	572
Brick and Stone Company, In re	[1878] W. N. 140	159
Bright *v.* Campbell	41 Ch. D. 388	166
Brinckman *v.* Matley	[1904] 2 Ch. 313	198
British Asbestos Company *v.* Boyd	[1903] 2 Ch. 439	148
British Mutoscope and Biograph Company *v.* Homer	[1901] 1 Ch. 671	609
Brittlebank *v.* Goodwin	L. R. 5 Eq. 545	28
Brocklehurst *v.* Jessop	7 Sim. 438	171
Bromfield, Ex parte	1 Ves. Jun. 453	678
Brown, In re	Unreported	617
——— *v.* Dawson	2 Vern. 498; Prec. Ch. 240	668
Browne *v.* La Trinidad	37 Ch. D. 1	148
Browne's Policy, In re	[1903] 1 Ch. 188	526
Bryant and Barningham's Contract, In re	44 Ch. D. 218	338
Buckwell and Berkeley, In re	[1902] 2 Ch. 596	124
Burdett-Coutts *v.* True Blue (Hannan's) Gold Mine	[1899] 2 Ch. 616	757, 829
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	10
Burroughs *v.* M'Creight	1 J. & Lat. 290	397
Burrowes *v.* Molloy	2 J. & Lat. 521	804
Burrows, In re	[1895] 2 Ch. 497	586
Burt, Boulton & Hayward *v.* Bull	[1895] 1 Q. B. 276	373, 502
Busfield, In re	32 Ch. D. 123	733
Bwllfa and Merthyr Dare Steam Collieries *v.* Pontypridd Waterworks Company	[1903] A. C. 426	292
Byrom *v.* Brandreth	L. R. 16 Eq. 475	137

C.

		PAGE
Caird *v.* Sime	12 App. Cas. 326	105
Caledonian Railway Company *v.* Sprot	2 Macq. 449	293
Caridad Copper Mining Company *v.* Swallow	[1902] 2 K. B. 44	156
Carr *v.* Anderson	[1903] 1 Ch. 90	443
—— *v.* Carr	1 Mer. 541, n	136
Carrara Marble Company, In re	[1896] W. N. 87	641
Carringtons, Ld. *v.* Smith	[1906] 1 K. B. 79	742
Carthew, In re	27 Ch. D. 485	126
Carven, In re	8 Beav. 436	126
Castell and Brown, Ld., In re	[1898] 1 Ch. 315	116, 663
Castlehow, In re	[1903] 1 Ch. 352	133
Cavander *v.* Bulteel	L. R. 9 Ch. 79	117
Chancey's Case	1 P. Wms. 408; 2 Wh. & T. 7th ed. 376	670
Chandler *v.* Pocock	15 Ch. D. 498	121
Chapel House Colliery Company, In re	24 Ch. D. 259	844
Chapman, Morsons & Co. *v.* Auckland Union	23 Q. B. D. 294	732
Chapman's Will, In re	32 Beav. 382	322
Charlton *v.* Charlton	32 W. R. 90; 52 L. J. (Ch.) 971	274
Charter *v.* Charter	3 Ch. D. 218	765
——— *v.* Watson	[1899] 1 Ch. 175	72
Charterland Stores and Trading Company, In re	[1900] 2 Ch. 870	640
Chatwood's Patent, In re	16 Rep. Pat. Cas. 370	87
Cheetham *v.* Ward	1 Bos. & P. 630	710
Cherry *v.* Boultbee	4 My. & Cr. 442	7
Chessum & Sons *v.* Gordon	[1901] 1 K. B. 694	126
Chic, Ld., In re	[1905] 2 Ch. 345	843
Chinnery *v.* Evans	11 H. L. C. 115	373
Christ Church, Oxford, Ex parte	Unreported	618
Christie *v.* Davey	[1893] 1 Ch. 316	238
Christopherson *v.* Naylor	1 Mer. 320	321
City and South London Railway Company *v.* London County Council	[1891] 2 Q. B. 513	514
City of Glasgow Union Railway Company *v.* Caledonian Railway Company	L. R. 2 H. L. Sc. 160	511
Clark, In re	13 Beav. 173	126
—— *v.* Sewell	3 Atk. 96	668
Clarke *v.* Blake	2 Bro. C. C. 320, note (1)	590
——— *v.* Clark	L. R. 1 Ch. 16	238
Clarkson *v.* Henderson	14 Ch. D. 348	74
Clavering *v.* Clavering	2 Vern. 473; Prec. Ch. 235	669
Clayton's Case	1 Mer. 572	116
Clegg *v.* Hands	44 Ch. D. 503	392
Clerical, Medical and General Life Assurance Society *v.* Carter	21 Q. B. D. 339	795
Cleveland's (Duke of) Settled Estates, In re	[1893] 3 Ch. 244	122
Clough, In re	31 Ch. D. 324	115
Clyde Navigation Trustees *v.* Laird	8 App. Cas. 658	207
Cockburn *v.* Edwards	18 Ch. D. 449	166, 169
Coghlan *v.* Cumberland	[1898] 1 Ch. 704	239
Cole *v.* Jealous	5 Hare, 51	542

		PAGE
Cole *v.* Sewell	4 D. & War. 1; 2 H. L. C. 186	47
Collins *v.* Blantern	2 Wils. 341; 1 Sm. L. C. 11th ed., p. 369	744
——— *v.* Castle	36 Ch. D. 243	257
——— *v.* Collins	31 Beav. 346	71
——— *v.* Martin	1 Bos. & P. 648	636
Colls *v.* Home and Colonial Stores	[1904] A. C. 179	245
Colman *v.* Eastern Counties Railway Company	10 Beav. 1	814
Compton (Lord) *v.* Oxenden	2 Ves. Jur. 261; 4 Bro. C. C. 397	673, 683
Consett Waterworks Company *v.* Ritson	22 Q. B. D. 318	285
Cotton *v.* Imperial and Foreign Agency and Investment Corporation	[1892] 3 Ch. 454	829
Coulthurst *v.* Carter	15 Beav. 421	322
Cox and Neve's Contract, In re	[1891] 2 Ch. 109	393
Crawley, In re	28 Ch. D. 431	801
Crichton *v.* Crichton	[1895] 2 Ch. 853; [1896] 1 Ch. 870	670
Crompton *v.* Sale	2 P. Wms. 553	669
Crook *v.* Hill	3 Ch. D. 773	545
Crossley & Sons *v.* Lightowler	L. R. 2 Ch. 478	240
Crump *v.* Lambert	L. R. 3 Eq. 409	234
Cunningham *v.* M'Donagh	[1904] 2 I. R. 417	493
Curtis *v.* Kesteven County Council	45 Ch. D. 504	348
Cuthbert *v.* Peacock	2 Vern. 593; 1 Salk. 155	668

D.

Dallas, In re	[1904] 2 Ch. 385	61
Dames and Wood, In re	27 Ch. D. 172; 29 Ch. D. 626	599
Darley *v.* Reg.	12 Cl. & F. 520	192
Davies *v.* Parry	[1899] 1 Ch. 602	223
——— *v.* Thomas	[1900] 2 Ch. 462	67
Davies' Will, In re	29 Beav. 93	65
Davis, In re	[1891] 3 Ch. 119	28
——— *v.* Tollemache	2 Jur. (N.S.) 1181	442
Dawes' Case	L. R. 6 Eq. 232	137
Dawkins *v.* Antrobus	17 Ch. D. 615	484
Dawson *v.* African Consolidated Land and Trading Company	[1898] 1 Ch. 6	158
Day and Night Advertising Company, In re	48 W. R. 262	525
Dean *v.* Bulmer	[1905] P. 1	765
Deighton and Harris's Contract, In re	[1898] 1 Ch. 458	415, 430
Dellwick's Patent, In re	[1896] 2 Ch. 705; 13 Rep. Pat. Cas. 591	87
Dent *v.* Dent	30 Beav. 363	800
Devaynes *v.* Noble	1 Mer. 529	139
Doe *v.* Clarke	2 H. Bl. 399	585
—— *v.* Lancashire	5 T. R. 49	585
—— *v.* Wainewright	5 T. R. 427	50
Dorin *v.* Dorin	L. R. 7 H. L. 568	545
Doughty *v.* Lomagunda Reefs, Ld.	[1902] 2 Ch. 837	829
Dovey *v.* Cory	[1901] A. C. 477	158
Dowding *v.* Smith	3 Beav. 541	65
Dowse, In re	50 L. J. (Ch.) 285	669

		PAGE
Drewett *v.* Edwards	37 L. T. 622; 26 W. R. 122	96
Du Bochet, In re	[1901] 2 Ch. 441	545
Duddell *v.* Simpson	L. R. 2 Ch. 102	416, 430, 599
Dudley Corporation and Earl Dudley's Trustees, In re	8 Q. B. D. 86	288
Duffield *v.* Elwes	2 Beav. 268	693
Dungannan (Lord) *v.* Smith	12 Cl. & F. 546	786
Dunn, In re	[1904] 1 Ch. 648	504
Dunsany's Settlement, In re	[1906] W. N. 51; [1906] 1 Ch. 578	446

E.

East Wheel Martha Mining Company, Re	33 Beav. 119	553
Ebbetts *v.* Conquest	[1895] 2 Ch. 377	34
Ecclesiastical Commissioners for England, Ex parte	11 Jur. (N. S.) 461	620
——— *v.* Parr	[1894] 2 Q. B. 420	397
Edmunds *v.* Low	3 K. & J. 318	670
Edwards *v.* M'Leay	G. Cooper. 308; 2 Swans. 287	341
——— *v.* Martin	25 L. J. (Ch.) 284	804
——— *v.* Thompson	38 L. J. (Ch.) 65	133
Elliot *v.* North Eastern Railway Company	10 H. L. C. 333	289
Elliott *v.* Dearsley	16 Ch. D. 322	532
Ellis *v.* Bedford (Duke)	[1899] 1 Ch. 494	326
—— *v.* Marshall & Son	64 L. J. (Q. B.) 757	778
Else *v.* Else	L. R. 13 Eq. 196	429
Etches *v.* Etches	3 Drew. 447	322
European Life Assurance Society, In re	L. R. 9 Eq. 122	137
Evans *v.* Jackson	8 Sim. 217	687

F.

Faber *v.* Gosworth Urban Council	88 L. T. 549	327
Fairclough *v.* Marshall	4 Ex. D. 37	38
Faithfull, Re	57 L. T. 14	216
Fanshawe *v.* London and Provincial Dairy Company	4 Times L. R. 694	238
Farnborough, In re Trusts of Land at	[1906] 1 Ch. 361, n.	361
Farnham's Settlement, In re	[1904] 2 Ch. 561	801
Farrand *v.* Yorkshire Banking Company	40 Ch. D. 182	663
Featherstone's Trusts, In re	22 Ch. D. 111	65
Ferguson *v.* Ferguson	L. R. 10 Ch. 661	700
Fergusson *v.* Norman	5 Bing. N.C. 76	744
Fishburn *v.* Hollingshead	[1891] 2 Ch. 371	777
Fisher *v.* Keane	11 Ch. D. 353	484
Fishmongers' Company *v.* East India Company	1 Dick. 163	245
Fletcher, In re	38 Ch. D. 373	669
——— *v.* Fletcher	9 L. R. Ir. 301	65

		PAGE
Fletcher *v.* Great Western Railway Company	4 H. & N. 242; 5 H. & N. 689	286
Flight *v.* Booth	1 Bing. N.C. 370	428
Foley *v.* Hill	2 H. L. C. 28	138
Fore Street Warehouses Company, In re	Palmer's Company Precedents, Part I., 8th ed., p. 1150	142
Foreman *v.* Free Fishers of Whitstable	L. R. 4 H. L. 266	192
Formby *v.* Barker	[1903] 2 Ch. 539	396
Forrest *v.* Manchester, Sheffield and Lincolnshire Railway Company	30 Beav. 40	814
Fortune Copper Mining Company, In re	L. R. 10 Eq. 390	641
Foster *v.* London, Chatham and Dover Railway Company	[1895] 1 Q. B. 711	313
——— *v.* Shaw	L. R. 5 H. L. 321	78
Fothergill *v.* Rowland	L. R. 17 Eq. 132	485
Fowler *v.* Fowler	3 P. Wms. 353	669
Fox, Ex parte	L. R. 6 Ch. 176	133
—— *v.* Garrett	28 Beav. 16	216
France *v.* Clark	26 Ch. D. 257	553
Frankfort *v.* Frankfort	4 Notes of Cases, 280	769
Freakley *v.* Fox	9 B. & C. 130	700
French-Brewster's Settlements, In re	[1904] 1 Ch. 713	678
Friern Barnet Urban Council *v.* Richardson	62 J. P. 547	348
Frost, In re	L. R. 5 Ch. 699	60

G.

		PAGE
Gard *v.* London Commissioners of Sewers	28 Ch. D. 486	303, 467
Garland, Ex parte	10 Ves. 110	502
Gaunt *v.* Fynney	L. R. 8 Ch. 8	238
Gaynon *v.* Wood	1 Dick. 331	670
Gee *v.* Pritchard	2 Swans. 402	105
Geipel's Patent, In re	21 Rep. Pat. Cas. 379	87
General Accident Assurance Corporation, In re	[1904] 1 Ch. 147	361
Gerard (Lord) and London and North Western Railway Company, In re	[1895] 1 Q. B. 459	285
German Date Coffee Company, In re	20 Ch. D. 169	483
Gibbon *v.* Paddington Vestry	[1900] 2 Ch. 794	302, 467
Gibson *v.* D'Este	2 Y. & C. C. C. 542	341
Giles *v.* Perkins	9 East, 12	635
Glasdir Copper Mines, Ld., In re	22 Times L. R. 100; [1905] W. N. 172; [1906] 1 Ch. 365	504
Glasgow Corporation *v.* Farie	13 App. Cas. 657	285
Glenton and Saunders to Haden, In re	53 L. T. 435	599
Gooding *v.* Read	4 D. M. & G. 510	624
Gordon *v.* St. Mary Abbott, Kensington (Vestry of)	[1894] 2 Q. B. 742	302, 467
Gorton, In re	40 Ch. D. 536	503
Graff *v.* Evans	8 Q. B. D. 373	484
Graham *v.* Sime	1 East, 632	536
Grainger, In re	[1900] 2 Ch. 756; [1902] A. C. 1	65

		PAGE
Grand Junction Waterworks Company *v.* Hampton Urban Council	15 Times L. R. 412	349
Grant *v.* United Kingdom Switchback Railways Company	40 Ch. D. 135	148, 829
Great Western Railway Company *v.* Bennett	L. R. 2 H. L. 27	284
Greaves *v.* Wilson	25 Beav. 290	415
Greenham *v.* Gibbeson	10 Bing. 363	14
Greenwood *v.* Hornsey	33 Ch. D. 471	732
——— *v.* Wakeford	1 Beav. 576	219
Greer *v.* Young	24 Ch. D. 545	272
Griffith *v.* Paget	5 Ch. D. 894	831
Griffiths' Policy, In re	[1903] 1 Ch. 739	528
Grissell, Ex parte	3 Ch. D. 411	374
Grissell's Case	L. R. 1 Ch. 528	3
Gurney *v.* Seppings	2 Ph. 40	553

H.

Hale *v.* Hale	Prec. Ch. 50	594
Hall *v.* Ewin	37 Ch. D. 74	392
Hall & Co. *v.* London, Brighton and South Coast Railway Company	15 Q. B. D. 505	648, 814
Hamer *v.* Giles	11 Ch. D. 942	56
Hamlet, In re	39 Ch. D. 426	576
Hancock, In re	59 L. T. 197	73
———, In re	[1896] 2 Ch. 173	528
Hannam *v.* Sims	2 De G. & J. 151	321
Harben *v.* Phillips	23 Ch. D. 14	155
Hargreaves, In re	43 Ch. D. 401	787
Harington *v.* Sendall	[1903] 1 Ch. 921	484
Harrison *v.* Abergavenny (Marquis of)	57 L. T. 360	485
——— *v.* Cornwall Mineral Railway Company	32 W. R. 748; 53 L. J. (Ch.) 596	271
Hartley's Case	L. R. 10 Ch. 157	663
Harvey *v.* Truro Rural Council	[1903] 2 Ch. 638	347
Haskell Golf Ball Company *v.* Hutchison	22 Rep. Pat. Cas. 478	519
Hastie's Trusts, In re	35 Ch. D. 728	542
Haven Gold Mining Company, In re	20 Ch. D. 151	483
Hawes *v.* Hawes	14 Ch. D. 614	65
Haycraft Gold Reduction and Mining Company, In re	[1900] 2 Ch. 230	148
Haynes *v.* Mico	1 Bro. C. C. 129	669
Haywood *v.* Brunswick Permanent Benefit Building Society	8 Q. B. D. 403	398
Heap *v.* Hartley	5 Rep. Pat. Cas. 603	610
Heather, In re	L. R. 5 Ch. 694	128
——— *v.* Pardon	37 L. T. 393	240
Heppenstall *v.* Hose	51 L. T. 589	414
Heriot's Hospital *v.* Gibson	2 Dow, 301	258
Hickey, In re	35 W. R. 53	699
Hilbers *v.* Parkinson	25 Ch. D. 200	446, 578
Hill, In re	33 Ch. D. 266	273
—— *v.* Crook	L. R. 6 H. L. 265	545
Hodge, Ex parte	16 Sim. 159	619
Holliday *v.* Wakefield Corporation	[1891] A. C. 81	285

		PAGE
Hopkinson *v.* Burghley (Lord)	L. R. 2 Ch. 447	104
——— *v.* Exeter (Marquis of)	L. R. 5 Eq. 63	484
Horbury Bridge Coal, Iron and Waggon Company, In re	11 Ch. D. 109	333
Horlock, In re	[1895] 1 Ch. 516	669
Hornby, Ex parte	Buck. 351	1
Horne, In re	[1905] 1 Ch. 76	795
Horsfall *v.* Thomas	1 H. & C. 90	341
Ho Tung *v.* Man On Insurance Company	[1902] A. C. 232	158
Hovenden *v.* Annesley (Lord)	2 Sch. & Lef. 607	72
Howe *v.* Smith	27 Ch. D. 89	340
Hulbert and Crowe *v.* Cathcart	[1894] 1 Q. B. 244	94
Hume *v.* Somerton	25 Q. B. D. 239	733
Hunter *v.* Northern Marine Insurance Company	13 App. Cas. 717	191
Hyde *v.* Hyde	13 P. D. 166	693

I.

Imperial Hydropathic Hotel Company, Blackpool *v.* Hampson	23 Ch. D. 1	148, 485
Incandescent Gas Light Company *v.* Brogden	16 Rep. Pat. Cas. 179	608
——— *v.* Cantelo	12 Rep. Pat. Cas. 262	608
Ingram *v.* Suckling	7 W. R. 386	572
Ireland *v.* Hart	[1902] 1 Ch. 522	661
Iron Ship Coating Company *v.* Blunt	L. R. 3 C. P. 484	155
Irvine *v.* Union Bank of Australia	2 App. Cas. 366	148
Isaacs *v.* Towell	[1898] 2 Ch. 285	428
Izard, Ex parte	23 Ch. D. 75	374, 504

J.

Jackson *v.* De Kadich	[1904] W. N. 168	797
——— *v.* Rowe	2 S. & S. 472	396
Jacobs *v.* Revell	[1900] 2 Ch. 858	396
James Colmer, Ld., In re	[1897] 1 Ch. 524	484
James Westoll, The	[1905] P. 47	733
Jenkins *v.* Jackson	[1891] 1 Ch. 89	520
Jones, In re	[1902] 1 Ch. 92	765
——— *v.* Curling	13 Q. B. D. 262	521
——— *v.* Hughes	[1905] 1 Ch. 180	456

K.

Kaye *v.* Croydon Tramways Company	[1898] 1 Ch. 358	830
Kearley *v.* Thomson	24 Q. B. D. 742	744
Keates *v.* Lyon	L. R. 4 Ch. 218	391
Keatley, Ex parte	25 L. R. Ir. 265	534
Keene *v.* Biscoe	8 Ch. D. 201	806
Kelly, Ex parte	31 L. R. Ir. 137	537
Kidman *v.* Kidman	40 L. J. (Ch.) 359	570
King of Hanover *v.* Bank of England	L. R. 8 Eq. 350	361

		PAGE
King's College, Cambridge, Ex parte	5 De G. & Sm. 621	619
Kingdon and Wilson, In re	[1902] 2 Ch. 242	126
Kingston-upon-Hull Dock Company v. Browne	2 B. & Ad. 43	180
Kirby v. Harrogate School Board	[1896] 1 Ch. 437	512
Kistler v. Tettmar	[1905] 1 K. B. 39	694
Knight, In re	[1892] 2 Ch. 368	273
——— v. Bowyer	2 De G. & J. 421	397

L.

Labouchere v. Hess	77 L. T. 559	105
——— v. Wharncliffe (Earl of)	13 Ch. D. 346	484
Lacy, In re	[1899] 2 Ch. 149	29
Laing v. Reed	L. R. 5 Ch. 4	484
Lake View Extended Gold Mine (Western Australia), Ld., In re	[1900] W. N. 44	829
Lake's Trusts, In re	63 L. T. 416	73
Langmead's Trusts, In re	20 Beav. 20; 7 D. M. & G. 353	113
Lathom v. Greenwich Ferry Co.	72 L. T. 790	372
Leach v. Jay	6 Ch. D. 496; 9 Ch. D. 42	123
Leake v. Robinson	2 Mer. 363	572
Lee v. Nuttall	12 Ch. D. 61	221
Leech v. Schweder	L. R. 9 Ch. 463	392
Leedham v. Chawner	4 K. & J. 458	504
Leeds and Hanley Theatre of Varieties v. Broadbent	[1898] 1 Ch. 343	806
Leeming, In re	3 D. F. & J. 43	679
Legg v. Mackrell	2 D. F. & J. 551	219
Leitrim (Lord) v. Enery	6 Ir. Eq. Rep. 357	678
Levy v. Stogdon	[1898] 1 Ch. 478	73
Lewis, In re	[1904] 2 Ch. 656	29
Leyland and Taylor's Contract, In re	[1900] 2 Ch. 625	338
Lincoln (Lady) v. Pelham	10 Ves. 166	65
Liverpool Improvement Act, In re	L. R. 5 Eq. 282	534
Llandudno Urban Council v. Woods	[1899] 2 Ch. 705	326
Lloyd, In re	[1903] 1 Ch. 385	74
——— and North London Railway (City Branch) Act, 1861, In re	[1896] 2 Ch. 397	534
——— v. Tench	2 Ves. Sen. 213	58
Locke-King v. Woking Urban Council	62 J. P. 167	348
London (Bishop of), Ex parte	2 D. F. & J. 14	617
London and Midland Bank v. Mitchell	[1899] 2 Ch. 161	73
London and North Western Railway Company and Carlisle Corporation, In re	Unreported	620
——— v. Price	11 Q. B. D. 485	313, 814
London and South Western Railway Company v. Gomm	20 Ch. D. 562	257, 386
London Association of Shipowners and Brokers v. London and India Docks Joint Committee	[1892] 3 Ch. 242	326
London Corporation, Ex parte	L. R. 5 Eq. 418	617
London County Council v. Attorney-General	[1901] 1 Ch. 781; [1902] A. C. 165	312, 811, 814
——— v. London School Board	[1892] 2 Q. B. 606	511

		PAGE
London County Council *v.* Wandsworth and Putney Gas Company	82 L. T. 562	514
London Founders Association *v.* Clarke	20 Q. B. D. 576	553
London Pressed Hinge Company, In re	[1905] 1 Ch. 576	843
London School Board and Foster, In re	87 L. T. 700	258
Long *v.* Blackall	7 T. R. 100	588
Loring *v.* Thomas	1 Dr. & Sm. 497	319
Loveband's Settled Estates, In re	9 W. R. 12	616
Lucena *v.* Lucena	7 Ch. D. 255	47
Lugar *v.* Harman	1 Cox, 250	65
Lurgan Urban Council, Ex parte	[1902] 1 I. R. 157	536
Lutterel's Case	Cited Prec. Ch. 50	599
Lynch *v.* London Commissioners of Sewers	32 Ch. D. 72	467
Lyons & Sons *v.* Wilkins	[1899] 1 Ch. 255	240
Lytton (Earl of) *v.* Devey	54 L. J. (Ch.) 293; 52 L. T. 121	105

M.

M., In re	[1899] 1 Ch. 79	734
McCallum, In re	[1901] 1 Ch. 143	28
McGruther *v.* Pitcher	[1904] 2 Ch. 306	610
Mackenzie *v.* Childers	43 Ch. D. 265	257
Mackreth *v.* Symmons	15 Ves. 329	71
McLean *v.* McKay	L. R. 5 P. C. 327	392
Maclean *v.* Moody	20 D. 1154	104
McMahon, In re	[1900] 1 Ch. 173	3
Magdalen Hospital *v.* Knotts	4 App. Cas. 324	429
Major *v.* Park Lane Company	L. R. 2 Eq. 453	512
Mander *v.* Falcke	[1891] 2 Ch. 554	392
——— *v.* ———	[1891] 3 Ch. 488	694
Mann *v.* Perry	50 L. J. (Ch.) 251	693
——— *v.* Stephens	15 Sim. 377	391
Manners *v.* St. David's Gold and Copper Mines, Ld.	[1904] 2 Ch. 593	748, 828
Manning *v.* Purcell	7 D. M. & G. 55	138
Mason *v.* Baker	2 K. & J. 567	65
——— *v.* Motor Traction Company	[1905] 1 Ch. 419	756, 829
Matson *v.* Scobel	4 Burr. 2258	191
Matthews *v.* Usher	[1900] 2 Q. B. 535	37
Maude, Ex parte	L. R. 6 Ch. 51	4
Mawson *v.* Fletcher	L. R. 6 Ch. 91	415
Mayne *v.* Mayne	[1897] 1 I. R. 324	136
Mellersh *v.* Brown	45 Ch. D. 225	72
Mersey Steel and Iron Company *v.* Naylor, Benzon & Co.	9 App. Cas. 434	504
Metcalfe's Case	13 Ch. D. 815	697
Metropolitan Board of Works, Ex parte	Unreported	620
——— *v.* Metropolitan Railway Company	L. R. 3 C. P. 612; 4 C. P. 192	288
Metropolitan District Railway Company *v.* Fulham Vestry	[1895] 2 Q. B. 443	303
Metropolitan Railway Company and Gonville and Caius College, Cambridge, In re	[1906] 1 Ch. 619, n.	619
Meyrick, In re	[1897] 1 Ch. 99	675
Milligan *v.* Mitchell	3 My. & Cr. 72; 1 My. & K. 446	483, 484

		PAGE
Mills *v.* Drewitt	20 Beav. 632	28
——— *v.* Revett	1 Ad. & E. 856	492
Montefiore *v.* Guedalla	[1903] 2 Ch. 723	435
Montgomerie & Co. *v.* Wallace-James	[1904] A. C 73	239
Moore *v.* North Western Bank	[1891] 2 Ch. 599	553, 661
Morison *v.* Morison	7 D. M. & G. 214	374
Morley, In re	[1895] 2 Ch. 738	801
Morris *v.* Elme	1 Ves. Jun. 139	502
Mortimer *v.* West	3 Russ. 370	546
Moser *v.* Marsden	13 Rep. Pat. Cas. 24	88
Mostyn *v.* West Mostyn Coal and Iron Company	1 C. P. D. 145	341
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	312
Munns *v.* Isle of Wight Railway Company	L. R. 5 Ch. 414	76
Murnaghan, In re	[1903] 2 I. R. 287	274
Musther, In re	43 Ch. D. 569	321

N.

Nash's Estate, Re	4 W. R. 111	537
National Provincial Bank of England *v.* Jackson	33 Ch. D. 1	663
Natt, In re	37 Ch. D. 517	60
Natusch *v.* Irving	2 Coop. C. C. 358	483
Neeld *v.* Hendon Urban Council	81 L. T. 405	347
Nelson *v.* Page	L. R. 7 Eq. 25	532
Nelthorpe *v.* Holgate	1 Coll. 203	416
New Balkis Eersteling, Ld. *v.* Randt Gold Mining Company	[1903] 1 K. B. 461; [1904] A. C. 165	6
New Zealand Gold Extraction Company (Newbery-Vautin Process) *v.* Peacock	[1894] 1 Q. B. 622	829
New Zealand Midland Railway Company, In re	[1901] 2 Ch. 357	272
———	[1901] W. N. 105	374
Newbigging *v.* Adam	34 Ch. D. 582	338
Newcombe *v.* Newcombe	3 Ir. Eq. Rep. 414	676
Newen, In re	[1894] 2 Ch. 297	437
Nicholl *v.* Eberhardt Company	61 L. T. 489; 1 Megone, 402	838
Nicholson *v.* Williams	L. R. 6 Q. B. 632	193
North American Land and Timber Company *v.* Watkins	[1904] 1 Ch. 243; [1904] 2 Ch. 233	28
North Eastern Railway Company *v.* Hastings (Lord)	[1900] A. C. 260	193
Nottage *v.* Jackson	11 Q. B. D. 627	776
Nottingham Patent Brick and Tile Company *v.* Butler	16 Q. B. D. 778	261

O.

O'Brien *v.* O'Brien	[1896] 2 I. R. 459	50
Occleston *v.* Fullalove	L. R. 9 Ch. 147	542
Oceanic Steam Navigation Company *v.* Sutherberry	16 Ch. D. 236	688
Official Receiver *v.* Tailby	18 Q. B. D. 25	635

		PAGE
Offiler, In re	83 L. T. 758	321
Oliver *v.* Oliver	11 C. B. (N.S.) 139	104
Owen, In re	23 L. R. Ir. 328	216
—— *v.* Routh	14 C. B. 327	554
Owen & Co. *v.* Cronk	[1895] 1 Q. B. 265	373
Owen's Patent, In re	15 Rep. Pat. Cas. 755	87
Oxenden *v.* Compton (Lord)	2 Ves. Jun. 69	678

P.

Painter *v.* Newby	11 Hare, 26	417
Paramore *v.* Greenslade	1 Sm. & Giff. 541	536
Parker *v.* Marchant	1 Ph. 356	137
Parnaby *v.* Lancaster Canal Company	11 Ad. & E. 223	192
Parry *v.* Hammersmith Corporation	21 Times L. R. 56	467
Parsons, In re	45 Ch. D. 51	61
Patman *v.* Harland	17 Ch. D. 353	393
Pawley and London & Provincial Bank, In re	[1900] 1 Ch. 58	765
Payne *v.* Cork Company	[1900] 1 Ch. 308	828
Pearce *v.* Carrington	L. R. 8 Ch. 969	586
Pearks *v.* Moseley	5 App. Cas. 714	786
Peel, In re	[1899] W. N. 208	765
Pelsall Coal and Iron Company, In re	8 Times L. R. 629	273
Pemberton *v.* Pemberton	2 Notes of Cases, 17	770
Pepe *v.* City and Suburban Permanent Building Society	[1893] 2 Ch. 311	485
Perkins *v.* Ede	16 Beav. 268	429
Perry *v.* Oriental Hotels Company	L. R. 12 Eq. 126	373
Pescod *v.* Westminster Corporation	[1905] 2 Ch. 475	302, 466
Petty *v.* Willson	L. R. 4 Ch. 574	137
Phillipo *v.* Munnings	2 My. & Cr. 309	27
Phillips, Ex parte	19 Ves. 118	679
—— *v.* Ivel Cycle Company	62 L. T. 392	520
Phosphate of Lime Company *v.* Green	L. R. 7 C. P. 43	158
Phosphate Sewage Company *v.* Hartmont	25 W. R. 743	700
Pickering *v.* Stephenson	L. R. 14 Eq. 322	483
Piggott *v.* Jefferson	12 Sim. 26	29
Pigot *v.* Cadman	26 L. J. (Ex.) 134	492
Pinkerton *v.* Easton	L. R. 16 Eq. 490	272
Pollard *v.* Photographic Company	40 Ch. D. 345	777
Pope *v.* Curl	2 Atk. 342	105
Postlethwaite *v.* Port Phillip and Colonial Gold Mining Company	43 Ch. D. 452	757, 830
Potter *v.* Jackson	13 Ch. D. 845	56
Pountney *v.* Clayton	11 Q. B. D. 820	284
Powell *v.* Powell	L. R. 19 Eq. 422	417, 429
Power *v.* Banks	[1901] 2 Ch. 487	116
Power's Settlement, In re	[1876] W. N. 205	618
Preston *v.* Etherington	37 Ch. D. 104	700
Price, In re	[1905] 2 Ch. 55	138
—— *v.* Livingstone	9 Q. B. D. 679	191
Prince, In re	[1898] 2 Ch. 225	764
Proud *v.* Turner	2 P. Wms. 560	58
Puckett and Smith's Contract, In re	[1902] 2 Ch. 258	428

Q.

		PAGE
Queen's Hotel Company, Cardiff, Ld., In re	[1900] 1 Ch. 792	272
Queensberry (Duke of) *v.* Shebbeare	2 Eden, 329	105

R.

Ralston *v.* Smith	11 H. L. C. 223	88
Ramuz and Edwards' Contract, Re	37 Sol. J. 701	414
Regent's Canal Ironworks Company, In re	3 Ch. D. 411	56
Reg. *v.* Harman	34 W. R. 355; 2 Times L. R. 234	191
—— *v.* London County Council	[1892] 1 Q. B. 190	468
—— *v.* Price	11 Ad. & E. 727	457
—— *v.* United Kingdom Electric Telegraph Company	31 L. J. (M. C.) 166; 6 L. T. 378	348
—— *v.* Wimbledon Local Board	8 Q. B. D. 459	333
Remnant, In re	11 Beav. 603	125, 493
Rex *v.* Tizzard	9 B. & C. 418	155
—— *v.* Wright	3 B. & Ad. 681	348
Rice *v.* Rice	2 Drew. 73	116, 663
Richard Mills & Co. (Brierly Hill), Ld., In re	[1905] W. N. 36	361
Richards *v.* Richards	Joh. 754	590
Rickard *v.* Barrett	3 K. & J. 289	448
Ridley, In re	[1904] 2 Ch. 774	216
Rigby *v.* Connol	14 Ch. D. 482	485
Roberts, In re	[1902] 2 Ch. 834	447
Rogers *v.* Hosegood	[1900] 2 Ch. 388	392
Roots *v.* Williamson	38 Ch. D. 485	661
Rorke, Ex parte	[1894] 1 I. R. 146	537
Rose *v.* Watson	10 H. L. C. 672	73
Ross *v.* White	[1894] 3 Ch. 326	56
Ross's Trusts, In re	L. R. 13 Eq. 286	60
Rowe, In re	58 L. J. (Ch.) 703	28
Ryan, In re	I. R. 3 Eq. 222	117
Rylands *v.* Fletcher	L. R. 3 H. L. 330	293

S.

Sailing Ship "Garston" Company *v.* Hickie & Co.	15 Q. B. D. 580	191
St. Helens Smelting Company *v.* Tipping	11 H. L. C. 642	234
St. James' Club, In re	2 D. M. & G. 383	483
St. Thomas' Dock Company, In re	2 Ch. D. 116	844
Salt, In re	[1896] 1 Ch. 117	712
Salton *v.* New Beeston Cycle Company	[1899] 1 Ch. 775	156
Salvin *v.* North Brancepeth Coal Company	L. R. 9 Ch. 705	238
Sander *v.* Heathfield	L. R. 19 Eq. 21	216
Sanders *v.* Kentish	8 T. R. 162	554
Sanders-Clark *v.* Grosvenor Mansions Company	[1900] 2 Ch. 373	238

		PAGE
Sargent, Ex parte	L. R. 17 Eq. 273	553
Sayers *v.* Collyer	28 Ch. D. 103	730
Schofield, Ex parte	12 Ch. D. 337	635
Scholey *v.* Peck	[1893] 1 Ch. 709	273
Scott and Alvarez's Contract, In re	[1895] 2 Ch. 603	395
Seaton *v.* Twyford	L. R. 11 Eq. 591	806
Sefton (Earl of), In re	[1898] 2 Ch. 378	725
Shaw, In re	[1894] 3 Ch. 615	764
Shelfer *v.* City of London Electric Lighting Company	[1895] 1 Ch. 287	733
Sheppard *v.* Gosnold	Vaugh. 159	193
Shipley *v.* Marshall	14 C. B. (N.S.) 566	635
Sibley's Trusts, In re	5 Ch. D. 494	66
Sidney *v.* Clarkson	35 Beav. 118	258
Skeats' Settlement, In re	42 Ch. D. 522	437
Skinner *v.* City of London Marine Insurance Corporation	14 Q. B. D. 882	553
Smith, In re	[1893] 2 Ch. 1	699
—— *v.* Chadwick	9 App. Cas. 187	239
—— *v.* Great Western Railway Company	3 App. Cas. 165	288
—— *v.* Hill	9 Ch. D. 143	72
Soar *v.* Ashwell	[1903] 2 Q. B. 390	28
Société Anonyme des Manufactures de Glaces *v.* Tilghman's Patent Sand Blast Company	25 Ch. D. 1	610
Société Générale de Paris *v.* Walker	11 App. Cas. 20	157
Solomon, Ex parte	1 G. & J. 25	4
Soper *v.* Arnold	14 App. Cas. 429	340
South Wales Railway Company, Re	14 Beav. 418	537
—— *v.* Redmond	9 W. R. 806	814
Southern Counties Deposit Bank *v.* Rider	73 L. T. 374	148
Sowerby *v.* Great Northern Railway Company	7 Ry. & Ca. Tr. Cas. 156	648, 814
Spedding *v.* Fitzpatrick	38 Ch. D. 410	347
Spencer's Case	5 Rep. 16a	398
Spicer *v.* Martin	14 App. Cas. 12	257
Spindler and Mear's Contract, In re	[1901] 1 Ch. 908	430
Stammers *v.* Elliott	L. R. 3 Ch. 195	1
Standard Bank of British South America *v.* Stokes	9 Ch. D. 68	512
Stanhope *v.* Manners	2 Eden, 197	804
Star-Bowkett Building Society and Sibun's Contract, In re	42 Ch. D. 375	599
Starkie, In re	3 My. & K. 247	442
State of Wyoming Syndicate, In re	[1901] 2 Ch. 431	148
Stein *v.* Ritherdon	37 L. J. (Ch.) 369	138
Stephens *v.* Mysore Reefs (Kangundy) Mining Company	[1902] 1 Ch. 745	483
Stevens, In re	[1888] W. N. 110, 116	633
—— *v.* Adamson	2 Stark. 422	335
Stockton and Darlington Railway Company *v.* Barrett	11 Cl. & F. 590	191
Stockton Football Company *v.* Gaston	[1895] 1 Q. B. 453	693
Stonor *v.* Fowle	18 Q. B. D. 213; 13 App. Cas. 20	95
Stourbridge Canal Company *v.* Wheeley	2 B. & Ad. 792	190

		PAGE
Strapp *v.* Bull, Sons & Co.	[1895] 2 Ch. 1; 72 L. T. 514	365, 375, 502
Stray *v.* Russell	1 E. & E. 916	558
Stroud *v.* Wandsworth District Board of Works	[1894] 2 Q. B. 1	303
Stroyan *v.* Knowles	6 H. & N. 454	284
Stuart *v.* Cockerell	L. R. 7 Eq. 363	786
Stummvoll *v.* Hales	34 Beav. 124	65
Sturges *v.* Bridgman	11 Ch. D. 852	234
Sturgis *v.* Morse	2 D. F. & J. 223	442
Sussex Brick Company, In re	[1904] 1 Ch. 598	157
Sutcliffe *v.* Howard	38 L. J. (Ch.) 472	787
Sutherland (Dowager Duchess of) *v.* Duke of Sutherland	[1893] 3 Ch. 169	14
Sutton *v.* English and Colonial Produce Company	[1902] 2 Ch. 502	148
Swinfen *v.* Swinfen	29 Beav. 199	678

T.

Taddy & Co. *v.* Sterious & Co.	[1904] 1 Ch. 354	610
Talbot *v.* Shrewsbury (Duke of)	Prec. Ch. 394	668
Taylor *v.* Great Northern Railway Company	L. R. 1 C. P 385	655
——— *v.* Neate	39 Ch. D. 538	502
——— *v.* Pilsen Joel and General Electric Light Company	27 Ch. D. 268	486
——— *v.* Russell	[1892] A. C. 244	663
Taylor's Agreement Trusts, In re	[1904] 2 Ch. 737	359
Tempest *v.* Kilner	3 C. B. 249	554
Tennant *v.* Smith	[1892] A. C. 150	197
Terry and White's Contract, In re	32 Ch. D. 14	428
Teuliere *v.* St. Mary Abbotts, Kensington	30 Ch. D. 642	467
Theaker's Settled Estates, In re	Wolstenholme's Conveyancing and Settled Land Acts, 9th ed., p. 332	148
Thellusson *v.* Woodford	4 Ves. 227	589
Thomas *v.* Daw	L. R. 2 Ch. 1	303, 467
——— *v.* Hunt	17 C. B. (N.S.) 183	610
——— *v.* Jones	1 Dr. & Sm. 134	274
Thompson, In re	30 Ch. D. 441	128
——— *v.* Hammersmith Corporation	[1906] 1 Ch. 299	467
——— *v.* Stanhope	Amb. 737	105
Thomson *v.* Eastwood	2 App. Cas. 215	28, 73
Thornhill *v.* Thornhill	14 Sim. 600	502
Tichborne *v.* Weir	67 L. T. 735	395
Timmis, In re	[1902] 1 Ch. 176	27
Toft *v.* Stephenson	7 Hare, 1	73
——— *v.* Stevenson	5 D. M. & G. 735	74
Toronto Municipal Corporation *v.* Virgo.	[1896] A. C. 88	483
Torrance *v.* Bolton	L. R. 8 Ch. 118	341
Townend *v.* Townend	[1905] W. N. 158	694
Trevor *v.* Hutchins	[1896] 1 Ch. 844	221
Trower *v.* Butts	1 S. & S. 181	586

		PAGE
Tuck & Sons *v.* Priester	19 Q. B. D. 629	777
Tucker *v.* Vowles	[1893] 1 Ch. 195	260
Tugwell, In re	27 Ch. D. 309	715
Tulk *v.* Moxhay	2 Ph. 774; 18 L. J. (Ch.) 83	391, 430
Turner, In re	43 W. R. 153; 13 R. 132	804
——— *v.* Green	[1895] 2 Ch. 205	338
Tytherleigh *v.* Harbin	6 Sim. 329	322

U.

Uckfield Rural Council *v.* Crowborough District Water Company	[1899] 2 Q. B. 664	514
Union Bank of London *v.* Ingram	16 Ch. D. 53	166
United Telephone Company *v.* Walker	4 Rep. Pat. Cas. 63	609
Upperton *v.* Nickolson	L. R. 6 Ch. 436	417

V.

Vaisey *v.* Reynolds	5 Russ. 12	137
Valletort Sanitary Steam Laundry Co., In re	[1903] 2 Ch. 654	113
Veale's Trusts, In re	4 Ch. D. 61	627
Victorian Daylesford Syndicate, Limited *v.* Dott	[1905] 2 Ch. 624; [1906] 1 Ch. 747, n.	740, 747

W.

Waite *v.* Littlewood	L. R. 8 Ch. 70	47
Walker and Oakshott's Contract, In re	[1901] 2 Ch. 383	684
——— *v.* London Tramways Company	12 Ch. D. 705	484
——— *v.* Mower	16 Beav. 365	570
Wall *v.* London and Northern Assets Association	[1898] 2 Ch. 469	829
—— *v.* Stanwick	34 Ch. D. 763	28
Waller *v.* Lacy	1 Man. & G. 54	492
Wallis *v.* Hodson	2 Atk. 114	586
Walter *v.* Lane	[1899] 2 Ch. 749; [1900] A. C. 539	104
——— *v.* Selfe	4 De G. & Sm. 315	236
Walters, In re	9 Beav. 299	124
Wankford *v.* Wankford	1 Salk. 299	710
Warner *v.* Warner	20 L. J. (Ch.) 273; 15 Jur. 141	545
Warren *v.* Warren	72 L. T. 628; 43 W. R. 490	770, 795
Watkins, In re	[1896] 2 Ch. 336	565
Watson, In re	[1892] W. N. 192	624
Waugh *v.* Waugh	2 My. & K. 41	321
Webb, In re	[1897] 1 Ch. 144	686
Wellington Corporation *v.* Lower Hutt Corporation	[1904] A. C. 773	200
Wells, In re	8 Beav. 416	126
——— In re	45 Ch. D. 569	220
Whalley, In re	20 Beav. 576	128

		PAGE
Whitham *v.* Kershaw	16 Q. B. D. 613	37
Whittington *v.* Seale Hayne	[1900] W. N. 31	338
Wicker *v.* Mitford	3 Bro. P. C. 442	65
Williams *v.* Barber	4 Taunt. 806	128
——— *v.* North's Navigation Collieries (1889), Ld.	[1904] 2 K. B. 44	327
Wilmer's Trusts, In re	[1903] 1 Ch. 874; [1903] 2 Ch. 411	586
Wilson *v.* Hart	L. R. 1 Ch. 463	392
Winch *v.* Thames Conservators	L. R. 9 C. P. 378	192
Winfield *v.* Boothroyd	54 L. T. 574; 34 W. R. 501	733
Wise, In re	[1896] 1 Ch. 281	624
Wolverhampton Corporation *v.* Emmons	[1901] 1 K. B. 515	37
Woodward, In re	30 Sol. J. 753	697
Woolcott *v.* Leggie	15 App. Cas. 42	599
Woolrich, In re	11 Ch. D. 663	322
Wrangham's Trust, In re	1 Dr. & Sm. 358	570

X.

X., In re	[1894] 2 Ch. 415	712

Y.

Young *v.* Ashley Gardens Properties, Limited	[1903] 2 Ch. 112	326

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re WEST COAST GOLD FIELDS, LIMITED. ROWE'S TRUSTEE'S CLAIM.

C. A. 1905

Oct. 30, 31; *Nov.* 9.

[0047 of 1905.]

Company—Winding-up—Surplus Assets—Distribution among Shareholders—Bankruptcy of Shareholder—Proof by Company for unpaid Calls and Liability to future Calls—Receipt of Dividend—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 133.

The holder of 1*l.* shares in a limited company, on which 10*s.* per share had been paid, became bankrupt, and the company proved in the bankruptcy for a call of 1*s.* per share, which had been made just before the bankruptcy, and for the bankrupt's liability in respect of the uncalled 9*s.* per share. The proof was admitted, and the trustee in the bankruptcy paid a dividend of 1*s.* 6*d.* in the pound. It was expected that a further dividend of 1*s.* 6*d.* in the pound would be paid. The company went into voluntary liquidation, and, after satisfying its debts and liabilities, there remained surplus assets in the hands of the liquidator:—

Held, that the bankrupt's shares could not by reason of the proof in the bankruptcy be treated as fully paid shares for the purpose of the distribution of the surplus assets, but that the holders of the other shares, which were in fact paid up in full, were alone entitled to share in the surplus assets until the amount paid on their shares respectively was reduced to that which had been in fact paid on the bankrupt's shares.

Decision of Buckley J., [1905] 1 Ch. 597, affirmed.

Ex parte Hornby, (1819) Buck, 351; and *Stammers* v. *Elliott*, (1868) L. R. 3 Ch. 195, explained and distinguished.

APPEAL from the decision of Buckley J. (1)

The above company was incorporated in 1901, with a capital

(1) [1905] 1 Ch. 597.

C. A. 1905

WEST COAST GOLD FIELDS, LIMITED, *In re.* ROWE'S TRUSTEE'S CLAIM.

divided into shares of 1*l.* each. The articles of association provided by clause 21 that the company should have a first and paramount lien on all shares not fully paid up, for all moneys due to (including calls made, even though the time appointed for their payment might not have arrived), and liabilities subsisting with, the company from or on the part of any registered holder of shares.

A. S. Rowe was the registered holder of 3500 fully paid shares, and also of 1800 shares of 1*l.* each, upon which 10*s.* per share had been paid up.

On January 8, 1903, the company made a call of 1*s.* per share on the 1800 shares.

On January 19, 1903, the call not having been paid, a receiving order in bankruptcy was made against Rowe, and on January 22, 1903, he was adjudicated a bankrupt.

On January 26 the company lodged a proof against the bankrupt's estate for 900*l.*, being as to 90*l.* in respect of the call of 1*s.* per share, and as to 810*l.* in respect of the balance of 9*s.* per share uncalled on the shares.

The company did not in their proof value the security given by their lien on the shares under clause 21 of the articles.

The trustee in the bankruptcy rejected the proof, but it was admitted by the Court for 819*l.*, being 90*l.* in respect of the call of 1*s.* per share, and 729*l.* in respect of the uncalled 810*l.*, a discount of 10 per cent. (81*l.*) being allowed.

In January, 1904, the trustee in the bankruptcy declared a dividend of 1*s.* 6*d.* in the pound, and the company received that dividend in respect of their admitted proof. It was estimated that the bankrupt's estate would realize about another 1*s.* 6*d.* in the pound.

In April, 1904, the company resolved upon a voluntary winding-up, and, after satisfying all their debts and liabilities, there remained in the hands of the liquidator surplus assets which it was estimated would be sufficient to pay 3*s.* per share on the fully paid shares in the company.

The trustee in the bankruptcy, under s. 138 of the Companies Act, 1862, took out a summons in the winding-up, asking for a declaration that, for the purpose of any distribution of the assets

of the company among the contributories, the bankrupt's 1800 shares ought to be treated as fully paid shares.

Buckley J. dismissed the summons. He held that the case was in principle governed by *Grissell's Case*. (1) The learned judge said that, though proof in the bankruptcy was equivalent to payment in the sense that the debtor could be pressed no further than for that amount, and he was discharged, yet his estate was not discharged. The proof was the record of the fact that his estate was liable, and that from his estate the proving creditor was entitled to receive, rateably with the other creditors, dividends until the whole amount had been paid. But the amount proved for was not paid. The trustee was seeking to get distribution as a contributory when he had not complied with his liability to pay as a contributory. The distribution of surplus assets was, in substance, repayment of that which had been paid—returning to the shareholders that which they had paid ; and when one man had paid more than another, he must be repaid first until he had been brought down to the level of the man who had paid less.

The trustee in the bankruptcy appealed.

Buckmaster, K.C., and *Felix Cassel*, for the trustee. It is submitted that from the date of the admission of the company's proof, these shares must be treated as fully paid, and that the liquidator has no right to take into account the fact that the shares have not been fully paid for in actual cash. It is well settled that in bankruptcy, when a creditor has proved for his debt and received his dividend, his debt is discharged : *Stammers* v. *Elliott* (2) ; *Armstrong* v. *Armstrong* (3) : and this applies to the case of a bankrupt shareholder in a company who is indebted for calls in arrear and is also liable for future calls, which liability is to be estimated for purposes of proof : *In re McMahon*. (4)

[VAUGHAN WILLIAMS L.J. referred to s. 133 of the Companies Act, 1862 (25 & 26 Vict. c. 89), as to the power of the liquidator in a voluntary winding-up to make calls on contributories.]

(1) (1866) L. R. 1 Ch. 528.
(2) L. R. 3 Ch. 195.
(3) (1871) L. R. 12 Eq. 614.
(4) [1900] 1 Ch. 173.

C. A. 1905 — WEST COAST GOLD FIELDS, LIMITED, *In re.* ROWE'S TRUSTEE'S CLAIM.

The company might have adopted either one of four courses—(1.) they might have forfeited the shares for non-payment of the call; (2.) they might have given notice to the trustee in the bankruptcy, under s. 55 of the Bankruptcy Act, 1883, requiring him to disclaim the shares, and if he had done so they could have proved in the bankruptcy for the damage resulting to them; (3.) they might have valued the security given to them by their lien on the shares and have proved for the balance of their debt; (4.) they might have proved for their debt and the future liability for calls on the shares, without valuing their security. They, in fact, adopted the latter course; probably because they thought it would be advantageous to them to prove against the bankrupt's estate for the largest possible amount. The company having adopted this course, it would be inequitable towards the other creditors of the bankrupt to allow them now to resile from the position which they have taken, and, in effect, to set off the bankrupt's liability on the shares against his right to share in the surplus assets. They do not propose to return the dividend which they have received. The proof by a creditor in a bankruptcy extinguishes or satisfies his debt, and this means that the proving creditor is debarred from claiming anything out of the common fund which would otherwise come to him: *Ex parte Hornby* (1); *Ex parte Solomon.* (2)

The equity of levelling down of the shareholders inter se in a winding-up is founded on this principle—that they must contribute equally to the losses of the company: *Ex parte Maude.* (3) If after satisfying the company's debts there is no surplus, the liquidator must make a call on those shareholders who have paid less than the others in order to equalize the loss. If there is a surplus, it may not be necessary to go through the form of making a call. In this case the liquidator is proceeding on the theory that the bankrupt or his trustee is still liable to the losses of the company, but that liability is the very thing for which the company has already proved in the bankruptcy. The trustee is acting in the interest of the creditors in the bankruptcy.

Astbury, K.C., and *P. M. Walters*, for the liquidator. *In re*

(1) Buck, 351. (2) (1821) 1 G. & J. 25.
(3) (1870) L. R. 6 Ch. 51.

McMahon (1) was a decision that, with administrators of the estate of a deceased insolvent shareholder in a company, the company may prove for the estimated value of his liability to future calls upon his shares. But, except in the argument in that case, it has never yet been suggested that such a proof in bankruptcy is equivalent to payment of the shares in full. The right of a contributory to share in a distribution of surplus assets of the company depends upon s. 133 of the Companies Act, 1862, which says that those assets shall "be distributed amongst the members according to their rights and interests in the company"; not according to their liabilities to the company. No doubt proof in bankruptcy is equivalent to payment so far as solution of the liability of the shareholder to the company is concerned. The claim of the liquidator as regards the surplus assets does not depend upon the liability of the shareholder upon the shares; that liability has been extinguished. No further call upon the shares can be made. A certificate of the shares would shew that 10*s.* per share has been paid up, and it would be stated to a purchaser that a dividend of 1*s.* 6*d.* in the pound has been paid in respect of the further liability upon the shares. The company could not be compelled to issue to a purchaser a certificate stating that which is not the fact, viz., that 20*s.* per share has been paid up.

[VAUGHAN WILLIAMS L.J. referred to s. 50, sub-s. 3, of the Bankruptcy Act, 1883, which enables the trustee in a bankruptcy to exercise the right to transfer (inter alia) shares in a company belonging to the bankrupt "to the same extent as the bankrupt might have exercised it if he had not become bankrupt."]

The trustee could sell the shares with the existing liability to calls upon them.

[VAUGHAN WILLIAMS L.J. So long as the trustee is not placed upon the register of shareholders he would not incur any liability. Sect. 55 seems to contemplate the possibility of the trustee's incurring a liability on the shares.]

No doubt a difficulty has been created by the decision that the future contingent liability of a bankrupt upon shares is a provable debt in the bankruptcy.

(1) [1900] 1 Ch. 173.

C. A.
1905
WEST COAST GOLD FIELDS, LIMITED, *In re* ROWE'S TRUSTEE'S CLAIM

It has been suggested that the liquidator is asserting the existence of a liability of the bankrupt which has been cancelled by the company's own act in proving for it in the bankruptcy. But that is not so, for the result would have been exactly the same if there had been no proof in the bankruptcy. By s. 37, sub-s. 3, of the Bankruptcy Act, 1883, this liability is provable in bankruptcy, and by s. 30, sub-s. 2, an order of discharge releases the bankrupt from all debts provable in the bankruptcy, other than the debts mentioned in s. 30, sub-s. 1, such as Crown debts and debts or liabilities incurred by fraud or fraudulent breach of trust. The present case really bears no analogy to the cases about executors which have been cited. The rights of the shareholders inter se are regulated by s. 133 of the Companies Act, 1862. The bankruptcy frees the shareholder from all liability or indebtedness, but it does not entitle him or his trustee to recover what he has not paid.

[VAUGHAN WILLIAMS L.J. If one party to a contract becomes bankrupt the other party is entitled to say, "I will not perform my part unless you perform yours."

STIRLING L.J. Has the trustee in the bankruptcy any right under the Act except either to be placed on the register of shareholders, in which event he will incur all the liabilities of a shareholder, or to transfer the shares, in which case he can only transfer the interest which the bankrupt would have had if he had not become bankrupt?]

A purchaser of shares forfeited for non-payment of a call is liable to pay future calls, even though they be for the amount unpaid of the call in respect of which the forfeiture was made: *New Balkis Eersteling, Ld.* v. *Randt Gold Mining Co.* (1) It would be a strange thing if a shareholder, by becoming a bankrupt, can get rid of all further liability on his shares (which he can do) and also that the trustee in the bankruptcy, who has not disclaimed the shares, should be free from liability on them, and even be entitled to a return of surplus assets. *Ex parte Hornby* (2) only decides that proof is equivalent to payment as regards the liability of the bankrupt and his estate. It does not affect the question whether

(1) [1903] 1 K. B. 461; [1904] A. C. 165. (2) Buck, 351.

shares are fully paid so as to entitle the shareholder to participate in surplus assets of the company. *Stammers* v. *Elliott* (1) went no further; the Court was then only dealing with an executor's right of retainer. *Cherry* v. *Boultbee* (2) shews what is an executor's right of retainer in the case of a bankrupt legatee who is a debtor to the testator. There is no obligation in the winding-up of a company to make any repayment out of surplus assets to a shareholder until he has paid up what was due in respect of his shares. That obligation of the shareholder is not discharged by his bankruptcy. The liquidator proposes to repay to the shareholders a part of what they have paid on their shares, and the surplus assets are only sufficient to pay 3*s.* per share to those shareholders who have paid 8*s.* 6*d.* per share more than has been paid on the bankrupt's shares. The question is simply what is the proper construction of s. 133 of the Companies Act, 1862, and it is submitted that Buckley J. has construed that section rightly.

Buckmaster, K.C., in reply. The company are estopped from saying that the shares are not fully paid, and if so, every shareholder is estopped. The company elected to do that which was disadvantageous to the other creditors of the bankrupt.

Nov. 9. STIRLING L.J. read the judgment of the Court (Vaughan Williams, Stirling and Cozens-Hardy L.JJ.) as follows:—The facts which give rise to the question now to be decided may be stated very briefly. The capital of the company was divided into shares of 1*l.* each. At the end of 1902 Rowe held 1800 of these shares, on each of which 10*s.* only had been paid up. On January 8, 1903, the company made a call of 1*s.* per share on each of the 1800 shares. On January 19, 1903, a receiving order was made against Rowe, and on January 22 he was adjudicated bankrupt. Subsequently the company carried in a proof against Rowe's estate, in respect as well of the unpaid call of 1*s.* per share as of the future uncalled liability of 9*s.* per share. This proof was ultimately admitted at 819*l.*, on which sum the company received from the trustee a dividend of 1*s.* 6*d.* in the pound. No further dividend has up to the present time been

(1) L. R. 3 Ch. 195. (2) (1839) 4 My. & Cr. 442, 447.

C. A. 1905

WEST COAST GOLD FIELDS, LIMITED, *In re.* ROWE'S TRUSTEE'S CLAIM.

paid; but it is expected that the estate will yield a further 1*s.* 6*d.* in the pound. In April, 1904, the company went into voluntary liquidation. After payment of all their debts and liabilities a surplus remains. On the majority of the shares in the company the full nominal value of 1*l.* per share has been paid, and the liquidator proposes to apply the surplus in repayment to the holders of those shares of 3*s.* per share, which will exhaust the fund. The trustee in Rowe's bankruptcy contends that, although cash to the amount of 11*s.* 6*d.* per share only has actually come to the hands of the company, nevertheless the 1800 shares ought for the purpose of any distribution of surplus assets among the contributories of the company to be treated as fully paid up, and has taken out a summons in the winding-up seeking a declaration that this is his right. Buckley J. has decided that the contention of the trustee is not well founded, and has dismissed the summons. From this decision the trustee has appealed.

By s. 133 of the Companies Act, 1862, it is provided that, subject to satisfaction of the liabilities of the company, the property of the company (where, as is the case here, there is no provision to the contrary made by the regulations of the company) is to be "distributed amongst the members according to their rights and interests in the company." In *Ex parte Maude* (1) it was decided that where some shares have been fully paid up and others have not, the holders of the fully paid up shares are, in a distribution of surplus assets in a winding-up, entitled to receive the amount paid by them in excess of that paid on the other shares before the holders of the latter receive anything. If then the 1800 shares are to be regarded as being paid up only to the extent of 11*s.* 6*d.* per share, the decision under appeal is fully justified. The appellant contends that the proof in the bankruptcy alters the case, and entitles him to say that the shares are fully paid up. In support of this contention cases are referred to, such as *Ex parte Hornby* (2), in which it is laid down that "proof is payment." No doubt it is true that proof deprives the creditor of any other remedy against the debtor or his estate, and in that sense proof is payment; but is proof payment in the sense that a company incorporated under the

(1) L. R. 6 Ch. 51. (2) Buck, 351.

Companies Acts is to be treated as having received, in cash, a portion of its capital which it does not receive? If so, then immediately upon the admission of the proof the shares became fully paid up, and, as was argued at the Bar, the trustee might have transferred them as such to a purchaser, even though no dividend was ever paid in the bankruptcy. Now, s. 25 of the Companies Act, 1867, provides that every share of a company shall be held subject to the payment of the *whole amount thereof in cash*, unless otherwise provided by a contract in writing. Proof is not payment in cash unless followed by dividend, and then only to the extent of the dividend paid; and, though the enactment just mentioned has been repealed, shares must still be paid up in money in the absence of a valid agreement for payment in money's worth. This view is, we think, in accordance with that taken by the Court of Appeal and the House of Lords of the general scope of the provisions of the Companies Acts with respect to the capital of companies in *New Balkis Eersteling, Ld.* v. *Randt Gold Mining Co.* (1): see in particular the observations in the judgment of Lord Halsbury L.C. (2)

What has been said suffices to dispose of this appeal, but it may be well to add a few remarks on some points which were pressed upon us in argument. Our attention was directed to the fact that the distribution of the bankrupt's estate is not yet closed and that there is a possibility of future dividends. It was asked, while this state of things continues, how is the liability on the shares to be defined in the event of a sale by the trustee of these shares? It was said, and with truth, that the company cannot have both the benefit of the proof and the liability of the purchaser for what remains unpaid on the shares. The question so asked does not arise in the present case, but it seems to us that one answer may be this. The trustee's duty is to transfer to the purchaser all the interest of the bankrupt in the shares: see Bankruptcy Act, 1883, s. 50, sub-s. 3. That interest comprises both that which has arisen from the payment actually made in respect of each share and the benefit which will accrue by the increase of value in the shares by the payment of further dividends under the proof in

(1) [1903] 1 K. B. 461; [1904] A. C. 165. (2) [1903] 1 K. B. 466-7.

C. A. 1905

WEST COAST GOLD FIELDS, LIMITED, *In re.* ROWE'S TRUSTEE'S CLAIM.

the bankruptcy. The liability, therefore, would be the amount which remains unpaid on the shares, *but with the benefit of any further dividends* under the proof; and the right to such benefit would properly be recognized by the company in the certificate given to the purchaser. Certainly there appears to be no insuperable difficulty in defining in this or some other way the liability in question. Again, it was said that several courses were open to the company when the proof was carried in, that the course actually selected threw the greatest burden on the bankrupt's estate; and that in these circumstances injustice would be done to the other creditors of the bankrupt unless the company were held to be precluded from saying that the shares were not fully paid up. No doubt under the provisions of the Bankruptcy Act the company might have taken any one of several courses; but we fail to see that the adoption by one creditor of that which he considers the most advantageous to himself gives the other creditors any right as against him, even although that course may be the most disadvantageous to them. Further, each dividend paid to the company, though it takes away something from the other creditors, at the same time would, as a general rule, add something to the value of the shares of which the other creditors would, on a sale, get the benefit; and, in our opinion, less than justice could be done to the company if that benefit were carried to the extent of treating the shares as fully paid up. In any case, we are unable to see that the company is estopped from saying that the shares have not been fully paid *in money*. The company has never represented that the shares have been fully paid up in money; neither the trustee in the bankruptcy nor any of the creditors has acted on such a representation in ignorance of the truth, and there is no room for the application of the doctrine which formed the basis of the decision in *Burkinshaw* v. *Nicolls*. (1) Lastly, the case of *Stammers* v. *Elliott* (2), which was much relied upon, does not govern the present, for the simple reason that the question there arose with reference to the rights inter se of the residuary legatees of a testator's estate, and did not in any way involve the consideration of the peculiar rights and liabilities

(1) (1878) 3 App. Cas. 1004. (2) L. R. 3 Ch. 195.

created by the Companies Acts on which the decision in this case turns. In our opinion, the appeal fails and must be dismissed with costs.

Solicitors: *Morley, Shirreff & Co.; Dollman & Pritchard.*

W. L. C.

C. A. 1905

WEST COAST GOLD FIELDS, LIMITED, *In re.* ROWE'S TRUSTEE'S CLAIM.

GILBEY *v.* RUSH.

[1904 G 1681.]

KEKEWICH J. 1905 *Oct.* 31; *Nov.* 1, 2.

Settled Land—Leasing Powers—Occupation Lease—Two Estates included in One Settlement—Principal Mansion House—Consent of Trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 53—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 10, *sub-s.* 2.

The consent of the trustees of the settlement, required by sub-s. 2 of s. 10 of the Settled Land Act, 1890, to be given to the sale or lease of the principal mansion house on any settled land, need not be communicated to the parties.

Two estates, each of which included a mansion house, were settled by the same instrument to the same uses. The tenant for life, acting under the powers of the Settled Land Acts, leased one of the mansion houses to his wife. The evidence shewed that the lease was advantageous to all the parties entitled under the settlement. Each of the trustees of the settlement, with full knowledge of the facts relating to the proposed lease, approved of it as being for the benefit of the estate, but neither of them gave any formal consent thereto, each being advised that the house in question was not the principal mansion house on the settled land:—

Held—(1.) on the evidence, that it was not the principal mansion house; (2.) that if any consent to the lease was required the trustees had given their consent.

The meaning of "principal mansion house" discussed.

THIS action was brought by Sir Walter Gilbey against Mrs. Juliet Rush for a declaration that a lease dated September 26, 1902, purporting to be granted to the defendant by her late husband under the powers of the Settled Land Acts was invalid as against the plaintiff.

In 1902 an estate in Northamptonshire comprising a mansion house known as Farthinghoe Lodge and lands of about 1240

KEKEWICH J. 1905 GILBEY v. RUSH.

acres, and an estate in Essex comprising a mansion house known as Elsenham Hall and extensive lands, stood limited under the will of George William Rush to uses under which George Acland Gordon Rush, the defendant's late husband, was beneficially entitled as tenant for life in possession, with remainders to his issue as in the will mentioned, with remainder to William Beaumaurice Rush for life, with divers remainders over.

Mr. J. A. Maxwell and Mr. W. D. Smythe were appointed trustees of the settlement for the purposes of the Settled Land Acts by an order of the Court dated June 25, 1894, and they continued to act as such trustees down to the present time.

Mr. G. A. G. Rush had first leased the Elsenham Hall estate, and afterwards sold his life interest therein to the plaintiff, who had also acquired the interest of Mr. W. B. Rush in both estates. He had also let the greater part of the Farthinghoe estate to farm tenants, but he occupied Farthinghoe Lodge, together with 130 acres of land, and lived there with his wife, the defendant. They had been married many years, and had no issue. The defendant, who had known Farthinghoe Lodge from her childhood, was strongly attached to it, and desired to continue residing there after her husband's death, and he was willing to give effect to this desire so far as the law allowed.

Accordingly by an indenture of lease dated September 26, 1902, Mr. G. A. G. Rush, in professed exercise of the powers of the Settled Land Acts, 1882 to 1890, demised to the defendant the house, with the stables, coach-house, and outbuildings thereto belonging, and also the garden and pleasure grounds thereto adjoining, containing in all about eight and a half acres, together with certain rights or easements over other parts of the estate in common with the persons for the time being entitled to the reversion of the demised premises, for the term of twenty-one years from September 29, 1902, at the yearly rent of 140*l.*, and the lease contained a covenant by the lessee to yield up the premises at the end of the term in such repair and condition as the same then were, as shewn in the schedule thereto, fair wear and tear excepted, and covenants by the lessor to keep the buildings and fences in such good and tenantable repair as the same then were.

After the granting of the lease Mr. Rush continued to live in the house with the defendant as before during the remainder of his life. He died without issue on November 2, 1903, and thereupon the plaintiff, as the assign of W. B. Rush's life interest, became entitled to the property. The defendant paid no rent during her husband's lifetime.

The plaintiff by his statement of claim alleged that Farthinghoe Lodge was the principal mansion house on the settled land, and that the lease was not authorized, inasmuch as it was granted without the consent of the trustees of the settlement, and without any order of the Court; that the lease was not made in bonâ fide exercise of the power of leasing under the Settled Land Acts, but in fraud thereof, and was a device to enable the defendant to continue residing in the house after her husband's death, and was, in fact, intended to operate as a lease to take effect in reversion expectant on his death; and that the defendant did not deal in good faith for the lease, and was a party to this device. He further alleged that the progressive deterioration of the house would be likely to necessitate entire rebuilding by the end of the term, and in any case would entail very serious loss. The plaintiff, however, did not complain that the rent was inadequate, or that the defendant was not a solvent tenant. The defendant denied these allegations, and alleged that Elsenham Hall, and not Farthinghoe Lodge, was the principal mansion house on the settled land, and further that the lease was granted with the full knowledge and consent of the trustees.

Both the trustees of the settlement gave evidence on the question of consent. Mr. Maxwell deposed that he was a member of the firm of Davids and Maxwell, estate agents, of Banbury; that he had acted as sole agent for the Farthinghoe estate since 1892; that in July, 1902, he discussed the question of the proposed lease with Mr. G. A. G. Rush, and that he took an active part in the negotiations; that he considered the propriety of the lease from the point of view of a trustee of the settlement, and came to the conclusion that it was advantageous to the settled estate; that he had never been formally asked to give his consent to the lease as trustee; that he

KEKEWICH J. 1905 GILBEY v. RUSH.

considered his consent was not necessary, as he was advised that Farthinghoe Lodge was not the principal mansion house on the settled land; and that he assented to the lease as trustee.

Mr. W. D. Smythe deposed that he was a member of the firm of Smythe and Brettall, who acted as solicitors for the trustees of the settlement; that at the time when the lease was first negotiated he was practising on his own account, but that he became a partner of the firm before the lease was executed, and that he examined the engrossment; that he had discussed the matter with his father, the senior partner of the firm, and knew all about it from the beginning; that he approached the consideration of the lease from the point of view of a trustee of the settlement, and as such approved of the lease after careful consideration; that he thought it the best thing for the estate and for all the parties concerned; that he regarded the consent of the trustees as unnecessary, being of opinion that Farthinghoe Lodge was not the principal mansion house, because he thought, erroneously as he had since discovered, that the lands occupied with the house were less than twenty-five acres. The effect of the evidence upon the remaining facts of the case sufficiently appears from the judgment.

Stewart-Smith, K.C., and *Wace*, for the plaintiff. The granting of this lease was not a bonâ fide exercise of the powers of the tenant for life: *Dowager Duchess of Sutherland* v. *Duke of Sutherland*. (1) Farthinghoe Lodge was the principal mansion house on the settled land, and therefore the consent of the trustees of the settlement to this lease was required by sub-s. 2 of s. 10 of the Settled Land Act, 1890, but no consent was ever asked for or given. The consent required to be given by the statute means consent before the execution of the lease; it does not mean subsequent approbation: *Bateman* v. *Davis* (2); *Greenham* v. *Gibbeson*. (3) There could be no consent of the trustees unless they knew that an act was about to be done, to which their consent was necessary.

Dighton Pollock (*P. O. Lawrence, K.C.*, with him), for the

(1) [1893] 3 Ch. 169. (2) (1818) 3 Madd. 98.
(3) (1834) 10 Bing. 363.

defendant. This lease was granted at a full rack rent and on proper conditions, and the remaindermen are not injured. It is, therefore, a good lease under the Settled Land Acts, subject to the question of consent. Here Elsenham Hall, and not Farthinghoe Lodge, was the principal mansion house, but if the consent of the trustees was required there has been a sufficient consent within the meaning of the statute. Consent is not defined either in the principal Act or in the Act of 1890, and there is no authority for shewing that anything in the nature of a formal consent is required. Consent in this enactment is equivalent to assent. If the trustees have considered all the facts of the case and have approved of the lease at the time, that is sufficient.

[KEKEWICH J. Did they consent to the lease of the principal mansion house?]

They consented to the lease of Farthinghoe Lodge, whether it was the principal mansion house or not, and they thought it the best thing for the reversion.

Wace, in reply. Sub-s. 2 of s. 10 speaks of the principal mansion house on *any* settled land, not on *the* settled land. The sub-section does not say that the house must be the principal mansion house on the whole of the land subject to the settlement. Therefore where there are several estates settled in the same way by the same settlement, and each of these estates includes a mansion house which, if that estate alone were settled, would be the principal mansion house, each of those mansion houses is the principal mansion house within the meaning of the sub-section. The Legislature did not intend that a comparison should be made of the mansion houses on the different estates in order to see which was the most important.

As to consent, the evidence shews that the trustees did not give their consent, although they would have given it if they had been asked.

KEKEWICH J. In 1902 Mr. George Acland Gordon Rush was tenant for life in possession of certain land settled by the will of George William Rush. He was not in physical possession of the greater part of the property, because it was let on lease; he was not in possession of the farms which were let to farming

KEKEWICH J.

1905

GILBEY v. RUSH.

tenants; he was not in possession of a considerable part of the property known as Elsenham Hall because that had been acquired first by lease and then by purchase of the life interest by the plaintiff in this action; but he was in legal terms tenant for life in possession of the whole; and he was in physical possession of a house called Farthinghoe and such lands as he chose to occupy therewith—some little arable land, pleasure grounds, and so forth, altogether about 130 acres. In the summer of 1902 he was minded to exercise the powers of leasing vested in him as tenant for life under the Settled Land Acts in order to grant a lease to his wife the present defendant Juliet Rush, now his widow; and she was anxious to have that lease. It is immaterial whether the idea proceeded in the first instance from her or from him. She says he suggested it. It may very well have been so, although, no doubt, it was an object which she had at heart. She was the first cousin of her husband, and had known Farthinghoe, her then residence, before her marriage, was much attached to it, and had spent money in improving the house; and she desired to remain there as long as the law would allow her to remain. Of course, she looked forward to the possibility of her husband's death. She says she did not anticipate his early death, but as a matter of fact he died very soon after the execution of the lease now in question. She had good reasons for thinking that that event might be anticipated, but on the other hand she did not look upon him, and as far as I can see she was quite right in not looking upon him, as a delicate man, and an early death did not necessarily enter into her calculations; but if she desired a lease at all, she of course desired a lease which would be prolonged beyond his life if he died early. She would have been glad, no doubt, to have a lease for a far longer period than twenty-one years, and he would have been quite willing to grant her a lease for her life if she had wished, but there was present to the minds of all concerned the question what lease he could properly grant. Such lease as he could properly grant he was willing to grant and she was willing to accept. Now, I cannot myself see any impropriety in that. It was a natural desire on her part and a natural desire on his part. So long as the lease was within his

legal powers what moral harm was there in a husband providing for his wife in that way? The law says he may. What moral code says he may not? I cannot myself see the slightest objection to the scheme, intended as it was to be founded on legal powers and carried out with strict reference to those legal powers. If, of course, a mistake has been made and the legal powers have been exceeded, then the lease will fail. That would be unfortunate for the lessee, but would not in the slightest degree impeach the moral conduct of either party. I take it that that is all that is really meant by the allegations in the statement of claim. [His Lordship referred to those allegations as set out in the statement of facts, and said that they did not really impute any want of moral conduct to either party, and that the real question raised by the statement of claim was whether the lease was properly granted according to the powers vested in the tenant for life, and he continued:—] Therefore I have no duty to perform in considering whether there was any impropriety of conduct. But I have to consider whether the lease was one which the tenant for life was empowered to grant, independently, I mean, of the two questions to which I will come presently.

Now, every precaution was taken to make sure that the lease should be a good one. The solicitors who were employed in the matter knew the property thoroughly well; the estate agents acting for the family knew all about the property; they also were concerned; and there was called in from outside a gentleman of as large experience as any man—Mr. Peck—and he gave most careful attention to the matter. It is, after what we have heard, useless to go through the correspondence and the facts in order to shew that the terms of the lease and the propriety of granting such a lease of settled property were fairly considered with reference to all parties concerned.

I have been referred to the case of *Dowager Duchess of Sutherland* v. *Duke of Sutherland*, before Romer J. (1) It is a very important decision with reference to the Settled Land Act, but it really has no direct bearing on the case before me. The questions which arose there were very different, but at the commencement of his judgment, the learned judge, referring to

(1) [1893] 3 Ch. 169.

KEKEWICH J. 1905 GILBEY v. RUSH.

the leases in question in that case, says this (1): "In my judgment, those leases were not granted by the late Duke in the bonâ fide exercise of his leasing powers for the benefit of the settled estate, but were granted for the purpose of conferring, as they did confer, a benefit upon his wife, the plaintiff, at the expense or to the serious injury of those who were to come after him, under the settlement, in the enjoyment of the estate." That to my mind explains exactly the meaning, or at any rate the meaning as regards this case, of the provisions of s. 53 of the Settled Land Act, 1882, which has given rise to some and may give rise to a great many other very nice and difficult questions. The section is this: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." How far that could be pressed it is not for me now to discuss; but I understand the learned judge to say in that case, and he is there referring directly to s. 53, that if the Court is satisfied that the lease (and the same would be true of a sale or exchange) has been granted by the tenant for life at the expense or to the serious injury of those who were to come after him, then that lease must fail. I cannot read his observations as meaning that the lease must fail because it is for the benefit of the lessee. Every lease, even with the most onerous covenants, and with the most extravagant rent, is presumably for the benefit of the lessee, otherwise the lessee would not accept it. It is the contrast between the benefit to the lessee and the injury to those who are to come after, which constitutes the offence against the Act and brings the case within s. 53.

I have therefore to consider whether the benefit conferred on this lady, because I assume it is a benefit and I have no doubt it was, was so conferred at the expense or to the serious injury of those who were to come after the tenant for life, the lessor. There is some evidence the other way, but taken as a whole the evidence is so strong against that view, that I think it is impossible to come to the conclusion that any injury has been

(1) [1893] 3 Ch. 187.

done, and certainly there is no room for supposing that any was intended to be done. [His Lordship discussed the evidence on this point and continued:—] But then it is said that so long as this lease endures the house cannot be altered, repaired or rebuilt, and if it requires alteration, repair or rebuilding, that is now deferred for nearly twenty-one years, and that is a serious injury to the estate. The answer to that seems to me to be that any lease would do that, and the Act certainly allows a tenant for life to grant a lease of any property, including the principal mansion house, with the consent of the trustees; and whenever a lease of a house is granted the alteration, repair or rebuilding of that house is necessarily postponed during the currency of that lease. I cannot accept the view that because there is a lease, therefore there is an injury. The Act of Parliament negatives the possibility of any such view. The rent was carefully considered by Mr. Peck, and it seems to have been so carefully done that even now, with every anxious desire to upset this lease, the plaintiff is bound to admit that he cannot call the rent in question. Then about the terms. The terms are really concerned with the covenants to keep in repair. I must rely upon the expert evidence. The expert evidence is perfectly clear that, having regard to the state of repair in which the house was, it was not improper—in fact it was proper—that the lessor should covenant to do all that was necessary. Beyond that there seems to be nothing to be said. But there is one point more. It is said that the lease, although of course intended in law to act in præsenti, was only granted to operate in futuro, that is to say, on the death of the tenant for life. The husband and the wife were living together on this property, and of course there was no alteration in physical possession during his life. It may be that during his life there was no such alteration in possession as would make the lease perfect in law from the date of its execution. That may or may not be so, yet the husband and wife are different persons in law, and there is no reason why the husband should not grant a lease to his wife. There is no reason why she should not as from that date enter into possession as lessee, and why he should not in law from henceforth be her tenant at will. I do not think it necessary to go into that,

KEKEWICH J. 1905 GILBEY v. RUSH.

and there is no evidence here, as apparently there was in the Sutherland case, that the intention of the parties was to grant a lease from time to time so that it might run really from the date of the death of the tenant for life. Indeed that view is negatived by this, to some extent at any rate, that the lady had spent a good deal of money on the repair of the house, and was intending to spend more. Whether she did in fact pay money for new liabilities incurred between the date of the lease and the date of the death seems to me to be immaterial, but I think the evidence goes to shew that she did pay moneys for work done after the commencement of the lease, although she was under no liability to the lessor to do that. If she did not in law take possession, she at any rate exercised acts of ownership which presumably she would not have done if she had not really been tenant under the lease. It seems to me, therefore, without going further into the matter, that here, as regards rent or terms, is a good lease from the husband to the wife of this property, provided it can be brought in other respects within the terms of the Settled Land Act.

Now for this purpose it is not necessary to go back to the Settled Land Act, 1882. We are dealing with the Settled Land Act, 1890, s. 10. But for s. 10 of that Act, and before that, but for s. 15 of the principal Act, there would have been no difficulty at all. The tenant for life was empowered to grant a lease of this property as of any other property of which he was the tenant for life, provided he observed the terms of the Act and took care particularly to do his duty as defined by s. 53 of the principal Act. But there is a proviso on the use or exercise of the power as regards the principal mansion house on any settled land. I have to consider whether this house at Farthinghoe can properly be said to be the principal mansion house on any settled land. I am not prepared to say there may not be more than one principal mansion house on land settled to the same uses by one and the same instrument. Probably it will be found that there are many cases in which on large estates there are several mansion houses, which might equally be styled principal mansion houses, and that all these lands are settled by one and the same instrument, or at any rate

fall within that which we are familiar with now, a compound settlement. It seems to me it is impossible to say that there cannot be two principal mansion houses on the same settled land in that sense—on lands which are held by the same tenant for life under the same title. It must be a question in every case, and it is easy, I think, to put a case where there would be two mansion houses and yet one would be distinctly the principal mansion house. I will give an illustration which has occurred to me, because it has been suggested, I think, without much foundation with reference to this particular place Farthinghoe. Supposing a gentleman has a mansion house where he generally resides, and at some distance —it may be miles away, and it may be in a different county, separated altogether from the rest of the estate—he has another property to which he resorts during the shooting or hunting season. He moves there with his establishment, his family, his plate and so forth, and during his residence there he is what we in my younger days would describe in one word—"the squire." It is a mansion house, and as regards that particular property it is necessarily the principal mansion house. But when he returns to the other he goes home. That is the residence of the family. In a simple case like that it would be impossible to say, I think, that the shooting or hunting box was the principal mansion house, and that he could not demise that without the consent of the trustees of the settlement. On the other hand, as has been put by the counsel for the plaintiff, there may be cases which probably many of us know, where families have two distinct mansion houses. They go from one to the other, and if they are held under the same settlement under the same title they may both be principal mansion houses, and the settled land for that purpose must be regarded in a different way from that in which I regard it here, as being the settled land comprised in the settlement. We must look, I think, at the particular facts. We know now that for more than one hundred years the Elsenham Hall estate in Essex and the Farthinghoe estate in Northamptonshire have been held under the same title. Probably there have been settlements and resettlements, as is usual in family estates, but the two have been the inheritance, if I may use the word, of the Rush family, and they are devised together by the will of

KEKEWICH J. 1905 GILBEY v. RUSH

George William Rush. They have been united for that time, and Elsenham Hall, if not technically yet as a matter of fact, has been the big house—the principal house—for a long time past. I have not therefore to consider whether Farthinghoe might be a principal mansion house, but whether it is *the* principal mansion house. If Farthinghoe had been settled alone, if I were dealing with Farthinghoe and Elsenham Hall were out of the question, I should have no hesitation in saying that Farthinghoe was the principal mansion house; but I have to consider whether, having regard to the union of the two estates, and upon a comparison of the two houses, Farthinghoe can properly be called the principal mansion house as compared with Elsenham Hall. It seems to me that one cannot do that, but that here the settled land is all the land comprised in the will devised thereby to the same uses, and that although, as I have said, there might be two principal mansion houses on the same settled land, still the principal mansion house on this settled land is necessarily Elsenham Hall and not Farthinghoe. But I recognize the difficulty of the question. I have expressed my opinion, formed after a great deal of consideration, but I can see that another view is perfectly possible, and therefore, although it is absolutely unnecessary after that expression of opinion to decide the second question, I think it is only right to the parties to express the conclusion at which I have arrived on that also. I am not sure that it is not more difficult than the other.

If Farthinghoe was the principal mansion house, which I will now, against my own opinion assume it to have been, then the consent of the trustees was necessary to the lease. The consent of the trustees means the consent of the trustees of the settlement for the purposes of the Settled Land Act. There were none under the will, but two gentlemen, Mr. Smythe, jun., and Mr. Maxwell, were appointed by an order of the Court. It is said that they gave their consent, and that is the question I am now proposing to decide. What consent is necessary? Now, in the first place, it must be a consent at the time; nothing retrospective will do. There was a passage cited from *Greenham* v. *Gibbeson* (1), which expresses that well. It must be a consent at the time and it must be a consent

(1) 10 Bing. 363.

ad hoc, with reference to the particular transaction, not given without deliberation, not given without reference to what was proposed at the moment; but given with direct responsibility, the knowledge coming home to their minds that they were trustees for the purposes of the Act and that it was incumbent upon them to consider whether their consent ought to be given or not. It need not certainly be a consent in writing. The Act has not said so, and it is impossible to introduce into the Act the words "in writing," which are not there. It need not, it seems to me, be a consent given either to the lessor or to the lessee. The Act does not say so, and so long as it was given in some way or other it seems to me to be immaterial whether it was expressed orally or otherwise to the parties. So far, I think, it is reasonably clear. Then, also, it must, of course, be the consent of both the trustees, and the consent of one assented to by the other without consideration might be difficult to support. It must be the consent of the two honestly given. Now let us see what happened. Mr. Maxwell was a member of the firm of estate agents who acted for the Rush family as regards Farthinghoe. He was concerned in this matter of the lease from beginning to end. He took an active part in it from first to last, and approved of it heartily, and thought it was the best thing to be done, not only for the benefit of the defendant, Mrs. Rush (of course he thought it was for her benefit), but also for the benefit of the estate. He thought it was an excellent arrangement. He gave it his full assent and consent in that way. Although it is pleaded, I do not think it has been proved that the assent was ever given to Mrs. Rush. It may have been given to Mr. Rush. I do not know. The evidence is silent on the point, and I cannot hold it to have been given to him when there is absolutely no evidence to support the finding. I think it was not given to the lady, although she was satisfied that the consent was forthcoming, and perhaps somebody told her that it had been given. That is the position of Mr. Maxwell. Mr. Smythe's position is not far different, although it is slightly weaker. Mr. Smythe was the son of the family solicitor; he was not then a member of the firm; he was not even a clerk in the firm at the time when this lease was first

KEKEWICH J. 1905 GILBEY v. RUSH.

talked about and negotiated, but he joined the firm before the lease was actually granted, and the papers passed through his hands and he knew all about it. The time, of course, for expressing the consent was when the terms were settled, and when it was known exactly what was intended to be done. He also told us that he entirely approved and thought it was a good thing to be done not only for the parties concerned but for the benefit of the estate. Why should that consent not be sufficient? The object of the Act is to provide that the tenant for life shall not part with the principal mansion house, pleasure grounds, and park, and lands usually occupied therewith, without the consent of the trustees. If they do consent, why is it necessary that that consent should be recorded in any way whatever, so long as it can be proved? That seems to be all that the Act requires. All that the Act aimed at seems to have been obtained by the mere fact of consent, and nothing more need be done. But there is a difficulty. The trustees are required to give their consent to the leasing of the principal mansion house, and unless it was the principal mansion house their consent was not required. I am now assuming that it was the principal mansion house. Each of these gentlemen tells us that he thought it was not the principal mansion house. Mr. Maxwell was so advised, and Mr. Smythe for different reasons, and as it happened for reasons which were not sound in fact, came to the same conclusion; and therefore it was immaterial for them to consider whether they should give their consent to a demise of the principal mansion house. It is said therefore, and with some force, that you have got no consent of the trustees to a demise of the principal mansion house. That rather troubled me, but the answer was well given, I think, by Mr. Pollock yesterday afternoon. He said that both these gentlemen consented to a demise of Farthinghoe Lodge, and that as long as they consented to the demise of Farthinghoe Lodge it was immaterial whether they considered it was the principal mansion house or not. I think that is a good answer. They did consent in fact to the demise of that which was demised. In arriving at the conclusion that they ought to give their consent they considered whether it was to the interest, not only of the parties

concerned, but of those entitled in remainder, and for the benefit of the estate. They came to that conclusion, knowing that the lease comprised Farthinghoe Lodge and some of the pleasure grounds and lands occupied therewith. It seems to me that, having come to that conclusion, it is immaterial that they thought it was not the principal mansion house, and it could have made no difference to them in the conclusion at which they have arrived. They have done that honestly, and I think I must take it that the consent was given. The result is that there must be judgment for the defendant with costs.

Solicitors: *Baileys, Shaw & Gillett; Granville Smith, Coleman, Betts & Co.*

H. B. H.

In re MACKAY. MACKAY *v.* GOULD.

[1903 M. 1285.]

Limitations, Statute of—Legacy—Action to Recover Legacy—Share of Testator's Estate—Express Trust—Infant Legatee—Duty of Executor to give Notice of Legacy—Real Property Limitation Act, 1874 (37 & 38 *Vict.* c. 57), *s.* 8.

A testator bequeathed all his property to his wife and children, and appointed his wife sole executrix. He left him surviving his wife and two infant children, viz., a son, long since deceased, and a daughter, who attained twenty-one in 1876. The widow married again, and during her daughter's infancy she, in her character of executrix, advanced all the testator's estate to her second husband upon the security of a mortgage which proved insufficient. She survived her second husband, and died in 1885, having left all her property away from her daughter. The daughter, as sole surviving beneficiary under her father's will, claimed the whole of her mother's estate, upon the ground that it represented moneys retained by her mother under an order of the Court in part satisfaction of the mortgage, and in 1903 she commenced an action against her mother's executors for an account on this footing:—

Held, that the mother was not an express trustee of these moneys for the plaintiff, that this was an action to recover a legacy within s. 8 of the Real Property Limitation Act, 1874, and that the claim was statute-barred.

Whether the mother was under any legal obligation to inform her daughter upon attaining twenty-one of the benefit conferred on her under her father's will, *quære*.

ALEXANDER MACKAY by his will dated August 26, 1856, left all his property "to my dear wife Mary Theresa Mackay and

KEKEWICH J.

1905

MACKAY, *In re.* MACKAY v. GOULD.

children," and he appointed his wife his sole executrix. The testator died in September, 1856, leaving him surviving his widow and two infant children, viz., one daughter, the plaintiff, who attained her majority on June 27, 1876, and one son, who died in 1874, and his will was proved by his widow. In 1857 the widow married Mr. G. R. Barry. Mrs. Barry, as executrix of her late husband, advanced to Mr. Barry 31,641*l.* 12*s.* 6*d.*, which was practically the whole of her late husband's estate, and took from him as security for that advance a mortgage dated October 5, 1866, on certain Irish estates. Mr. Barry died insolvent in January, 1867, having appointed his wife sole executrix of his will. In 1867 an action was commenced in the Court of Chancery in Ireland by the Agra Bank against Mrs. Barry claiming priority in respect of certain advances made by the plaintiffs to Barry over the mortgage of October 5, 1866, and in that action Mrs. Barry filed a document, called an answering affidavit, in which she deposed as follows: "Said sum of 31,641*l.* 12*s.* 6*d.* does not include one farthing of property which at any time belonged to George Richard Barry, but entirely represents trust property received by him . . . . and it is to secure said sum that the mortgage next mentioned" (being the mortgage of October 5, 1866) "was executed by George Richard Barry." The Master of the Rolls in Ireland found in favour of the plaintiffs (1); but his decision was reversed by the Court of Appeal in Ireland (2), and their decision was affirmed by the House of Lords. (3) In 1868 a creditor's action for the administration of Barry's estate was brought against Mrs. Barry, and by an order made on the further consideration of that action on August 1, 1882, it was ordered that Mrs. Barry should be at liberty to retain a sum of 8683*l.* 5*s.* 1*d.* and certain other personal estate of the deceased in part satisfaction and discharge of the moneys due under the mortgage of October 5, 1866. Mrs. Barry by her will made on December 9, 1882, appointed the defendants executors thereof, and left all her property away from the plaintiff, and she died in 1885, leaving personal estate of the value of 8243*l.* 1*s.* 11*d.* The will was proved by the defendant

(1) (1869) Ir. R. 3 Eq. 443. (2) (1871) Ir. R. 6 Eq. 128.
(3) (1874) L. R. 7 H. L. 135.

Gould alone. The plaintiff alleged that upon the death of Mrs. Barry the defendants, from their knowledge of Mrs. Barry's affairs, were put upon inquiry as to the trust estate of Alexander Mackay. She further alleged that the 8243*l.* 1*s.* 11*d.* represented the sum of 8683*l.* 5*s.* 1*d.* above mentioned, and constituted the estate of Alexander Mackay, which Mrs. Barry, as his executrix, held upon trust for herself and the plaintiff as joint tenants; that Mrs. Barry never informed the plaintiff of the existence of Alexander Mackay's will; and that until December, 1902, the plaintiff remained wholly in ignorance of her rights thereunder and believed that the property which Mrs. Barry purported to dispose of by her will was her (Mrs. Barry's) own absolute property. The plaintiff accordingly commenced this action in 1903 against the defendants for a declaration that upon the true construction of the will of Alexander Mackay she was entitled as sole surviving beneficiary under the will to the whole of his estate; an account of the estate of Alexander Mackay, deceased, and of the cash and investments representing the same which Mrs. Barry as executrix of his will received, and which the defendants as executors and trustees of the will of Mrs. Barry had respectively received, and of their dealings and transactions therewith respectively; and payment of what should be found due upon taking the account, with interest from the death of Mr. Barry. The defendants, among other defences, pleaded that the action was barred by the Real Property Limitation Act, 1874, and the Trustee Act, 1888.

Stewart-Smith, K.C., and *H. L. Fraser*, for the plaintiff. As soon as Mrs. Barry realized the testator's estate she became a trustee for herself and her children, and therefore the doctrines relating to trustees apply. The Real Property Limitation Act, 1874, s. 8, does not apply, because Mrs. Barry, by retaining and investing the property, had converted herself from an executrix into a trustee, and this action is brought, not to recover a legacy, but to compel the defendants, as Mrs. Barry's personal representatives, to account for a breach of trust: *In re Timmis* (1); *Phillipo* v. *Munnings*. (2) It may be said that Mrs. Barry was

(1) [1902] 1 Ch. 176. (2) (1837) 2 My. & Cr 309.

KEKEWICH J. 1905 MACKAY, *In re.* MACKAY v. GOULD.

not an express trustee because she was not declared a trustee by the instrument itself, but she occupied a fiduciary relation towards the persons entitled to claim the property, and she did not hold it in virtue of any right of her own, and consequently her liability was that of an express trustee: *Soar* v. *Ashwell* (1); *North American Land and Timber Co.* v. *Watkins.* (2) Further, Mrs. Barry made herself an express trustee by her admission in the action of *Agra Bank* v. *Barry* (3), and she was so regarded by the Master of the Rolls in Ireland. (4) The defendants are therefore driven to rely upon the Trustee Act, 1888, s. 8; but they cannot bring themselves within that enactment, because the plaintiff is seeking to recover property which was retained by Mrs. Barry till her death, and which is now in the hands of the defendants.

Further, there was an improper concealment of the will by the mother. The mother being executrix of the will, there was a duty cast upon her, as guardian by nurture to the plaintiff, to inform the plaintiff upon her attaining twenty-one of her rights under the will, and if, withholding that information, she retained the property which her child could have claimed, if she had known her rights, that, in the eye of a Court of Equity, was a fraud: *Brittlebank* v. *Goodwin* (5); *Wall* v. *Stanwick* (6); *Thomson* v. *Eastwood* (7); *In re McCallum.* (8)

If, as we shall prove here, part of the fund remains in specie it belongs to the plaintiff, and the Statute of Limitations cannot be set up as a bar to her right: *Mills* v. *Drewitt.* (9)

P. O. Lawrence, K.C., and *Christopher James*, for the defendants. There is here no express trust, and therefore the Statute of Limitations applies: *In re Rowe* (10); *In re Davis.* (11) Those cases shew that "legacy" in s. 8 of the Act of 1874 includes a gift of a share of the testator's estate, and that an executor does not hold legacies upon an express trust for the legatees so

(1) [1893] 2 Q. B. 390, 397.
(2) [1904] 1 Ch. 243; [1904] 2 Ch. 233.
(3) Ir. R. 3 Eq. 443; Ir. R. 6 Eq. 128; L. R. 7 H. L. 135.
(4) Ir. R. 3 Eq. 443.
(5) (1868) L. R. 5 Eq. 545, 550.
(6) (1887) 34 Ch. D. 763.
(7) (1877) 2 App. Cas. 215, 244.
(8) [1901] 1 Ch. 143.
(9) (1855) 20 Beav. 632.
(10) (1889) 58 L. J. (Ch.) 703.
(11) [1891] 3 Ch. 119

as to oust the operation of the statute. This is really an action to recover legacy, and is barred. No trust could be put upon Mrs. Barry except that which was incidental to every executorship. There was here nothing but a direct gift and the appointment of an executor: *In re Lacy.* (1)

The fact that the legacy is given to an infant, and that the parent is executor, does not convert the executor into an express trustee: *Piggott* v. *Jefferson.*(2)

Further, an executor is under no obligation to give notice of a legacy to the legatee even though the executor himself takes a beneficial interest in the gift: *In re Lewis.* (3) The authorities cited on behalf of the plaintiff are distinguishable as being cases of express trusts.

Stewart-Smith, K.C., in reply.

KEKEWICH J. having by a judgment given in the course of the trial decided that the plaintiff was aware of the will during her mother's lifetime, but that she had not received all that she was entitled to thereunder, now gave judgment upon the law. He said:—It is now necessary to decide whether the Statute of Limitations affords an answer to the plaintiff's claim or not. The statute in question is the Real Property Limitation Act, 1874, and the only section affecting the question is s. 8, which provides that no action shall be brought to recover, among other things, any legacy "but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same."

The plaintiff attained her majority on June 27, 1876, and then became a person capable of giving a discharge for or a release of that which she now claims, and the action was not commenced until long after twelve years from that date, and therefore, if the statute applies in point of law, there is no doubt about its being applicable in point of fact, and that the claim is barred. Is this which the plaintiff claims a legacy? The words of the statute are "or any legacy." That question must be first answered. Under the will of her father, Alexander Mackay, the plaintiff

(1) [1899] 2 Ch. 149. (2) (1841) 12 Sim. 26.
(3) [1904] 2 Ch. 656.

KEKEWICH J. 1905 MACKAY, *In re.* MACKAY *v.* GOULD.

became entitled to a share—it matters not for the moment what share—of his estate. He gave everything of which he was possessed to his wife and children, and he appointed his wife sole executrix. He left two children, the plaintiff being one of them. I say for the present purpose it matters not whether this was a joint tenancy, as no doubt it was, or not: she took a share of the estate. If the claim is against the defendant Gould—there being now no claim against the other defendant—in his character of representative of a trustee in the strict sense of the word, it is common ground that the action is not barred by the statute, except for one reason which it is not necessary to consider at present. If, on the other hand, Gould is sued as representative of an executor, then it seems that the statute applies and that the claim is barred. For that proposition it is only necessary to cite one case, although that is not the only one, and others may be mentioned in another connection. The case of *In re Davis* (1) was a suit to recover a share of residuary estate. I will take the statement of facts from the judgment of Fry L.J. At the commencement of his judgment he says: "The plaintiffs are suing the executor of the executor of the grandmother to recover one-third of moneys which form part of her residuary estate"; and in that case it was held that the statute applied. It seems, therefore, that if the testator's widow only held the moneys representing his estate as executrix, then Gould is in precisely the same position as the defendant in the case I have cited, viz., the executor of the executor of the original testator, and cannot be sued after the twelve years have run, as in point of fact they have.

But it is said that the widow was not only an executrix, but was a trustee, and divers reasons were put forward for that. In the first place, it is said that when the duties of an executor in the strict sense of the word are performed, and the executor retains moneys on behalf of those claiming the estate—and the argument must also be good as regards an administrator—then he becomes an express trustee for the legatees, or, if it is an administrator, for the next-of-kin. No authority is cited for that, and in my opinion the proposition is

(1) [1891] 3 Ch. 119, 125.

unsound. I see no reason for converting an executor into a trustee by anything like a performance of his duties qua executor. The argument must go to this length, that once the debts and funeral and testamentary expenses are paid, then the residue is held upon an express trust. Reference is made to authorities which show the difficulty of determining the time at which persons who are appointed executors and trustees, and to whom money is given in that character, cease to hold it as executors, and commence to hold as trustees. The exact moment of passage from one character to the other is difficult to define; but there is no difficulty in saying that at some point of time the executor becomes a trustee and, the trusts being sufficiently declared, an express trustee, and then the consequences of that conversion follow. Those authorities, it seems to me, have nothing to do with a case such as this, where there is a direct gift and the executor only claims the property virtute officii, and, when he has discharged his duties as executor, holds it in a loose sense, as Lindley L.J. says, as a trustee for those who are concerned. That is one argument in favour of converting Mrs. Barry into an express trustee, and to my mind it fails.

The other argument is this: Mrs. Barry was defendant in an action in which really the whole of the testator's estate was at stake. She had allowed her husband, Barry, to take possession of the whole estate, and in the action of *Agra Bank* v. *Barry* (1) the question arose whether a claim of the bank against Barry's estate took precedence over a mortgage granted by Barry in favour of his wife to cover moneys which she had advanced to him. She had to defend that action, and she had to defend it on behalf not only of herself, but of others, and in a document called an answering affidavit, which is equivalent to her plea in the case, she said that the sums which she claimed entirely represented trust property received by Barry. In one sense it was trust property, and she recognized that if she recovered it, and she did recover it, she would have been bound to hold it as trust property in the same loose sense in which, as Lindley L.J. says, an executor is always a trustee for creditors and legatees. She could only claim it in that character. The same remark

(1) Ir. R. 3 Eq. 443.

KEKEWICH J. 1905 MACKAY, *In re.* MACKAY v. GOULD.

appears to me to apply to the language of the Court in dealing with the case in Ireland. In a sense no doubt she was a trustee, but I see no reason for holding that in either one way or the other she had converted her character from the character of an executor to the character of a trustee any more than was the case in *In re Rowe* (1), where the Court declined to hold that the signing of the residuary account by the executor constituted the executor a trustee for the residuary legatee or amounted to a declaration of trust. This admission is not a declaration of trust. It is only an expression which the poverty of language obliges one to use. There is nothing at all approaching a change from one character to another. It seems to me that I should be departing from *In re Rowe* (1) and *In re Davis* (2) if I were to hold that in this case Mrs. Barry, merely by process of time because she had discharged her duties, or because she called herself a trustee, ever became an express trustee for her children. If that is so the statute applies.

But then it is said in answer to that that she had a duty to disclose to her children upon their attaining their majority their rights under the will. For that a passage is cited from the judgment of Giffard V.-C. in *Brittlebank* v. *Goodwin*. (3) I do not propose to go into that case fully, and therefore I will merely read the passage which has been cited, and which, strange to say, seems to have escaped the notice of counsel and of the Court in another case to be mentioned presently, in which it would have been particularly apposite. The Vice-Chancellor, speaking of an administrator of an executor, said: "Another duty was to have informed the persons interested, when they attained twenty-one, of the position of the fund and of their rights." It may be that at some future date it will be necessary to examine those words more closely in order to ascertain exactly what the Vice-Chancellor meant, and how far his language ought to be taken literally and applied to a case such as that with which we are now dealing, but for the moment I do not think that is necessary. But before I give my reasons for so thinking let me look at the case of *In re Lewis* (4),

(1) 58 L. J. (Ch.) 703.
(2) [1891] 3 Ch. 119.
(3) L. R. 5 Eq. 545, 550.
(4) [1904] 2 Ch. 656, 661, 664.

where it was said, apparently, that there was no such duty. There Vaughan Williams L.J., in giving judgment, referring to certain necessary admissions made by the plaintiff's counsel in the course of the argument, said: "He had to start with this admission—that primâ facie there was no duty on the executor to disclose"; and I observe that that was concurred in by the other Lords Justices. Thus, Cozens-Hardy L.J. says: "We start with this—that it is plain there is no primâ facie duty resting on an executor to give notice." That is, to give notice of the rights of those who could make claims against them. Having regard to that decision, it is a question whether the language of the Vice-Chancellor, which deserves the most respectful consideration, may not require to be examined more closely hereafter. I see very great difficulty in saying that an executor is bound to give notice to a legatee or to any one else who is entitled to claim against the estate of the benefits conferred upon him by the will—I mean bound in the sense that any consequences follow from his not performing the obligation. Bound in one sense he may be. There may be an imperfect obligation to disclose, but a perfect obligation, *i.e.*, an obligation to which a sanction is attached, seems to me to be very difficult to hold. But it is not necessary to go into that, because I have held that the plaintiff knew her claims under her father's will perfectly well throughout. It is quite possible that she did not know whether she was a joint tenant or a tenant in common, but it could not have been the duty of the executrix to explain the law to her. All the duty that could have been put upon the mother was to say: There is your father's will, under which you take an interest, and what that interest is your lawyer will explain to you. I have not the slightest doubt that the mother did tell her. She could not have known it from any other source. Therefore, if there was any duty cast upon the mother, that duty has been performed. In my opinion, therefore, the claim is barred by the Statute of Limitations, and the action fails. There will be judgment for the defendants with costs.

Solicitors: *T. C. Summerhays; Trinder, Capron & Co.*

H. B. H.

KEKEWICH J.

1905

Nov. 13, 14.

MOLYNEUX *v.* RICHARD.

[1903 M. 1085.]

Lease—Covenant to Build—Specific Performance.

The lessee of a plot of land for a term of ninety-nine years, commencing in 1894, covenanted within three years from the commencement of the term to erect seven dwelling-houses on the demised premises, similar to dwelling-houses already erected in a certain street. The lease contained an exception of the minerals (which did not belong to the lessor) and reserved to the owner for the time being full rights of working, including power to destroy the surface. At the date of this lease the lessee had acquired from the owner a lease of the minerals with full surface rights. The houses in the street in question were not exactly alike, some having four rooms and others five. In an action for specific performance of the covenant :—

Held—(1.) Upon the construction of the lease that the covenant was not extinguished by the power reserved by the lease to the mineral owner to destroy the surface; (2.) that damages assessed on the principle of *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377, would afford no adequate remedy; (3.) that the houses to be erected were sufficiently defined to enable the Court to order specific performance; and specific performance was ordered accordingly.

This was an action for specific performance of a covenant to build contained in a lease dated July 28, 1894, and, in the alternative, for damages for breach of covenant. By the lease in question Mr. Isaac Colquhoun demised to the defendant Richard four parcels of land near Percy Street, Gorse Road, Swansea Higher (with the exceptions and reservations hereinafter mentioned), for the term of ninety-nine years from March 25, 1894, at the yearly rent of 50*l.*; and the defendant covenanted with the lessor that he would within three years from the said March 25, 1894, erect and build seven messuages or dwelling-houses on the demised premises, with all suitable outbuildings thereto, in a workmanlike manner and under the direction and to the satisfaction of the surveyor or agent for the time being of the lessor, and similar to the messuages or dwelling-houses and premises already erected in Percy Street aforesaid, and also would at all times during the said term keep the said dwelling-houses

and all other buildings connected therewith erected or to be erected on the demised premises in good and substantial repair and condition, and in such good and substantial repair and condition would deliver up the same to the lessor at the end or sooner determination of the term. And it was thereby declared that all rights and obligations of the lessor and lessee thereunder should be incident to and devolve with the reversion expectant on the said demise and the leasehold interest thereby created, and should accordingly be enjoyed and observed by the person or persons in whom such reversion and leasehold interest respectively should for the time being be vested. The lease also contained an exception and reservation out of the demise therein contained unto the person or persons who would, if the lease had never been executed, be for the time being entitled thereto of all coal, culm, ironstone, iron ore, quarries, stone, clay, and other mines and minerals lying and being within and under the demised premises, with full power to enter upon and occupy the surface thereof, or any part thereof, and to search for and work, win, and get the said mines and minerals, or any mines and minerals in, under, or upon other lands, without leaving any vertical or lateral support for the surface of the said ground demised, or any buildings then or which thereafter might be erected thereon, and for the purposes aforesaid, or any of them, to sink pits, erect buildings, furnaces, ovens, machinery, and apparatus, and to make and use railroads and other roads, pit hills, spoil banks, and so forth, and generally to do upon, over, and under the surface of the said premises all things which might be found necessary, convenient, or proper for the purposes aforesaid, or any of them, making and paying from time to time to the lessee, his executors, administrators, or assigns, reasonable compensation for the damage which might be so done, the amount thereof to be settled by arbitration in manner therein provided.

By an indenture dated October 16, 1894, Mr. Colquhoun conveyed the lands the subject of this lease to Mr. Albert Mason, since deceased, in fee simple, subject to and with the benefit of the lease. By an indenture dated November 19, 1895, Mr. Mason conveyed the said lands by way of mortgage to the plaintiff and another as joint tenants, to secure 3250*l.* and interest, and this

KEKEWICH J. 1905 MOLYNEUX v. RICHARD.

mortgage had since become vested in the plaintiff, and the mortgage debt was still due and owing. The plaintiff required the defendant to build the seven houses on the demised land in accordance with his covenant, and for this purpose submitted to him a plan similar to the plan of a four-roomed house in Percy Street to work from, but the defendant refused to comply with this demand, and thereupon on April 7, 1903, this action was commenced.

It appeared that the cottages in Percy Street were not all exactly alike. Some had four rooms, others five, and one had six; and this variety was relied upon by the defendant as an answer to the claim for specific performance.

It also appeared that an action had been already brought against the defendant by the mortgagor, Mr. Mason, for possession of the premises comprised in the lease and for damages for breach of the building covenant; and that in June, 1901, Mr. Mason accepted the sum of 25*l.* in settlement of that action, and the defendant relied upon this settlement as a defence to this action.

The mines and minerals excepted from the lease of July 28, 1894, belonged to the trustees of the late Calvert Jones, and by an indenture of lease dated March 21, 1894, a part of these minerals was leased by these trustees to the defendant for a term of forty-two years, with full powers of working the same, including power to cover the surface with pit hills and spoil banks. The defendant in working the coal under this lease had already covered the greater part of the surface with pit hills and spoil banks; he had also recently started a brickmaking business on the premises, and in connection with these works he had erected several buildings, comprising an engine house, offices, stables and sheds; and he pleaded that if any further buildings were erected they would be destroyed or rendered useless by reason of the lessee's exercise of his powers under the mineral lease.

This action was originally brought against Richard alone, but Mason's legal personal representative was subsequently added as a defendant.

P. O. Lawrence, K.C., and *J. F. Waggett*, for the plaintiff. First as to the alleged settlement with Mason. The authorities

shew that a mortgagor in possession of land subject to a lease is not the owner of the reversion on the lease so as to entitle him to sue upon the covenants, and this question is not affected by s. 25, sub-s. 5, of the Judicature Act, 1873: *Matthews* v. *Usher*. (1) Therefore Mason had no power to accept the compromise, because he had no power to bring the action.

Secondly, it is suggested that this covenant cannot be enforced by reason of the fact that the lessee has obtained a lease of the minerals under the demised premises, with full surface rights, but the direct bargain made by the defendant with the surface owner is one which the Court will enforce against him, whatever his rights may be aliunde.

Thirdly, as to relief. As a general rule, the Court will not grant specific performance of a building contract, but there is a recognized exception to that rule where the lessor can shew: (1.) that the building work is sufficiently defined by the contract; (2.) that he cannot be adequately compensated for breach of the contract by damages; (3.) that the lessee has obtained possession on the faith of the contract to build: *Wolverhampton Corporation* v. *Emmons*. (2) Here all these conditions concur. It is difficult to see how the plaintiff can be compensated by damages. It is settled by authority that the measure of damages is the difference in the value of the reversion at the end of the term, with the covenant performed and with the covenant unperformed, less a discount for present payment: *Ebbetts* v. *Conquest* (3); *Whitham* v. *Kershaw*. (4) But this lease has ninety years to run, and the discount will wipe out all that could be recovered. Therefore on that hypothesis the lessor is entitled to nothing. This case differs from most cases on the subject, first, because the lease has been granted before the erection of the buildings; and secondly, because the lessee is allowed to depreciate the rest of the demised property by tipping. Those are both reasons for enforcing the covenant by specific performance. No case can be found in which damages for breach of covenant have been awarded to the lessor of a ninety-nine years'

(1) [1900] 2 Q. B. 535.
(2) [1901] 1 K. B. 515.
(3) [1895] 2 Ch. 377, 383.
(4) (1885) 16 Q. B. D. 613.

KEKEWICH J. 1905 MOLYNEUX v. RICHARD.

lease. Specific performance alone will put the parties in the right position, and it will not injure anybody.

Stewart-Smith, K.C., and *Meager*, for the defendants. First, as to construction. The covenant to build is subject to the right to tip. The houses may be put anywhere upon the demised land, and there is no obligation to build if the ground is occupied by tip. The paramount object was to provide a tip ground.

Secondly, as to specific performance. The covenant to build is not sufficiently definite. It differs from the contract in *Wolverhampton Corporation* v. *Emmons* (1), because here the lessee is not bound to build to the plans of the lessor, and the covenant is not made more definite by the reference to the houses in Percy Street, inasmuch as there are different varieties of houses there. Further, there is a great hardship in enforcing this covenant by specific performance, since the plaintiff has stood by and allowed the lessee to cover the land with tip and to put up buildings. Moreover, specific performance will not be granted where the damages are inappreciable, and in considering this question the Court will not take into account damages which are incapable of assessment by the only method known to the law.

Thirdly, as to damages. Although the plaintiff is technically the owner of the reversion, his real interest is as mortgagee, and non constat that he will lose anything. In order to maintain this action he must shew a sensible depreciation of the mortgage security. Further, the expenditure actually incurred by the defendant in building on this property is more than the equivalent of these houses. Further, the settlement with the mortgagor, though not technically a defence to the action, must be taken into consideration. Suppose the mortgagor redeemed, it would be a great injustice that he should be held entitled to the houses as well as to the compensation. Sect. 25, sub-s. 5, of the Judicature Act, 1873, has been considered in *Fairclough* v. *Marshall* (2), where the Court thought that it could not have been intended that the mortgagor should be able to sue for rents and profits and should not be able to sue, for example, on a covenant to repair.

(1) [1901] 1 K. B. 515. (2) (1878) 4 Ex. D. 37, 45.

KEKEWICH J. The defendant is lessee under a lease of July 28, 1894, of certain lands for a term of ninety-nine years, at a rent of 50*l.*, and he has covenanted, among other things, as follows: [His Lordship read the covenant to build, and continued:—] The first question which is raised is a question of the construction of the lease. The defendant says that, notwithstanding that express covenant, he is not bound to build seven or any number of houses. The argument is this: The lease contains very large powers of interfering with the surface, and there is express power to cover the surface with pit hills and spoil banks; and there is also power to work the minerals underneath the surface without leaving any vertical or lateral support for the surface or any buildings which might be erected thereon. It is said that the two provisions of the lease are contradictory, and that this power is inconsistent with the covenant to build. It cannot have been intended, so it is said, that the lessee should be bound to erect seven houses when there is an express provision that he should be at liberty to cover all the land with pit hills and spoil banks. To-day it is said he may erect the houses, and to-morrow he may pull them down in order to put his pit hills and spoil banks there; and it is alleged that even now there is not much room for the houses, and that very shortly all the land will be required for pit hills and spoil banks. I use that as a comprehensive term to include all interference with the surface in connection with the working of the minerals. The answer, to my mind, is that the defendant is bound by solemn covenant to erect these houses. He has entered into a covenant not only to erect but to maintain and deliver up the houses at the end of the term. Whether that is consistent or not with the power to cover the surface with pit hills and spoil banks it is not for me to say. Possibly some method might be found of reconciling the two provisions. It is not necessary for me to inquire whether the defendant's claim to pull down the houses if erected can be upheld or not. All that I need decide is that this covenant to build cannot be said to be extinguished by the liberty not yet exercised to cover the land with pit hills and spoil banks. Therefore it seems to me that here is a binding covenant, and it is admitted that the defendant has not fulfilled the covenant.

KEKEWICH J. 1905 MOLYNEUX v. RICHARD

But then it is said that the plaintiff is entitled to no remedy. I expressly say "entitled to no remedy," because the argument comes to that, but in form it is that the plaintiff is not entitled to specific performance. I must take the defendant's objections seriatim. But first let us see what the tests of the right to specific performance are. It is not necessary nowadays to go back to the old cases, because the law is laid down in the plainest possible terms by the Court of Appeal in *Wolverhampton Corporation* v. *Emmons*. (1)

It was there recognized that the general rule in equity was that an agreement to erect buildings could not be specifically performed, although Collins L.J. thought, and I respectfully agree with him, that the Courts of Equity had not always been consistent in following that rule. But it was also recognized that there had been established certain exceptions to that general rule, and those exceptions are clearly stated by A. L. Smith M.R. and Romer L.J., and are also referred to by Collins L.J.; and their enunciation of the law may be taken to state accurately the extent of the exceptions. The Master of the Rolls says this (2): "The authorities . . . . appear to me to shew that, where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building, of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by Courts of Equity in relation to such matters, specific performance ought to be ordered." Romer L.J. also states the three points in his judgment. I will not pause to read his language. The first thing to be considered is whether there is here in the words of the Master of the Rolls "a building of which the particulars are clearly specified." In that case it was admitted that the particulars of the buildings had not in the first instance been clearly specified, but after some dispute plans were submitted to the defendant, and there was no question that the buildings were to be erected according to those plans. So far there is a distinction between that case

(1) [1901] 1 K. B. 515. (2) [1901] 1 K. B. 522.

and this, but the members of the Court of Appeal, in laying down the rule, do not rest on the circumstances of that particular case. They do not define what is clear specification; they only say that where there is a clear specification of the particulars specific performance follows. It is said that there is no clear specification here. The language of the covenant is this: "to erect and build seven messuages or dwelling-houses on the demised premises with all suitable outbuildings thereto." Then follow words which are not inappropriate where they stand, but must be treated parenthetically for the purpose of understanding what class of buildings is to be erected. Those words are: "in a workmanlike manner, and under the direction and to the satisfaction of the surveyor or agent for the time being of the lessor." They do not in the slightest degree specify what the buildings are to be, but the words which follow the words which I have just read do, and they must be read as immediately following the words, "suitable outbuildings thereto." They are, "and similar to the messuages or dwelling-houses and premises already erected in Percy Street aforesaid." Part of the demised land bounded on Percy Street, and in Percy Street were erected a number of cottages. The covenantor has only to look at the houses in Percy Street to find out what they are, and then he is to erect buildings not identical with, but similar to those houses, the only difference for this purpose between the two words being that he would not be under any liability for breach of contract if he departed in some non-essential particulars from the houses in Percy Street. So far there is no difficulty. But then it is said that the houses in Percy Street are not all the same, and that there is sufficient variety to make it uncertain which is to be followed. They are all workmen's cottages, and built on similar lines, but they vary in form to some extent. They were mostly four-roomed cottages, but there were some of five rooms and one of six. They have been in some instances increased by additions to the original erections. There is nothing to shew what, if any, variety existed when they were originally built, but I will assume that there was some variety then. Still it seems to me that the covenantor is under no difficulty. He is not bound to copy the very best of these houses. He would

KEKEWICH J.
1905
MOLYNEUX v. RICHARD.

comply with his covenant if he followed that which was least onerous to himself, and built an ordinary four-roomed cottage, of which there are several there. It seems to me that the houses to be built are sufficiently defined within the meaning of the language used by the Court of Appeal. One of the plaintiff's witnesses had prepared for submission to the defendant a plan on these lines, and the similarity of the plan to the Percy Street houses can be easiiy recognized; and we have had in the witness-box a builder who says he would have no difficulty in constructing a cottage according to that plan without anything more. It seems to me that to hold that specific performance is not to be decreed on the ground that the particulars of the buildings are not clearly specified because there is at the present time some little variety in the cottages to be copied, or even because there was at the date of the lease some little variety, would be to prune down unfairly the language of the Court of Appeal. It cannot have been intended that "clearly specified" should mean leaving no room for doubt. That gets rid of the first objection.

The second objection is that the plaintiff is only a mortgagee, and it is said that as mortgagee he can only recover damages on the footing of his security being in danger or insufficient, that that cannot be proved until he has attempted to realize, and that it may turn out that he has a wholly sufficient security. No case has been cited in support of this branch of the case. The argument must go so far as to say that no mortgagee who is without an express grant of the benefit of a covenant in any lease could ever sue on that ground. Take the case of an ordinary grant of a mortgage in fee of lands which are leased to farmers. There happens to be a covenant in one of the leases not to erect a public-house on the demised premises. There is evidence that the erection of a public-house would seriously damage the rest of the property. According to the argument put forward on behalf of the defendant the plaintiff is out of Court because it may be that until he has attempted to realize his security he cannot say whether it is sufficient or insufficient. It seems to me that that argument goes to oust the right of a mortgagee to sue on many covenants

such as are found in a large number of leases. Nothing more need be said as to that.

I will leave to the last the most serious point of the case, but will, before dealing with it, touch on another which has been raised. It is said that the defendant has settled with the mortgagor, and that they entered into a settlement, as they had a right to do, in the case of *Mason* v. *Richard*. It appears from the proceedings in that action that ultimately an arrangement was made that a sum of 25*l*. in Court should be paid out to the plaintiff in satisfaction of the cause of action. What was the cause of action? The action was to recover possession of this very property. The plaintiff asked for possession and for damages in respect of breaches of the covenants in the lease. On account of the defendant's breach of covenant in not building houses on the premises he sued to recover possession. I need go no further. There is the distinct authority of the Court of Appeal in the case of *Matthews* v. *Usher* (1) that that action was not maintainable. The point there was thoroughly considered, and the decision is exactly applicable to this case. The Court held that the mortgagor had no cause of action, and therefore in this case there was nothing for the mortgagor to settle, and it was impossible that the settlement which he accepted could in any way prejudice the rights of his mortgagee.

There remains one further point. In the passage I have read from the judgment of A. L. Smith M.R. in *Wolverhampton Corporation* v. *Emmons* (2), it was laid down that, beyond the clear specification of the buildings to be erected, you must find, in order to justify a decree for specific performance, a definite contract by which a person who has acquired land in consideration thereof has agreed to erect on the land so acquired buildings, the erection of which is of importance to the other party which cannot adequately be measured by pecuniary damages. That there was here a definite contract to erect buildings is perfectly clear. That it was part of the bargain by which the defendant obtained possession of the land is also perfectly clear. Therefore we need not pause to inquire how far he acquired the land in consideration of the contract. But it is

(1) [1900] 2 Q. B. 535. (2) [1901] 1 K. B. 515.

KEKEWICH J. 1905 MOLYNEUX v. RICHARD.

said that the erection of the buildings is not of such importance to the other party to the contract, the plaintiff, that the breach of the contract cannot be adequately measured by pecuniary damages. That is the question which I now propose to consider. What is the object of inserting a covenant of this kind? It is common ground—and it is so clear that it hardly needs explanation—that the object of inserting in a lease a covenant to erect houses and to maintain them and yield them up at the end of the term is to secure the rent. If a demise is made with liberty only to build, the lessor has the lessee's covenant for the payment of rent, and if the lessee is a solvent person he can recover it in that way. But if the rent is not paid he has no means of protecting himself except by recovering possession of the land, and upon entering possession he may find that the land is not so valuable as he supposed, or as it was before the demise. Therefore it is usual where building is contemplated, and especially where it is part of the bargain by which the lessee obtains possession of the land, to insert in the lease an express covenant to build. Then the lessor gets a security for the rent by means of the erection of the buildings. The buildings are to be of a certain character and of a certain value, as is shewn in this case by the reference to the buildings in Percy Street. Money must be spent upon them, and not only is the lessor extremely likely to be able to recover his rent, if he is obliged to enter into possession, but he has a lever which he may use against the lessee for the purpose of extracting payment from him, for if the lessee has spent money in the erection of buildings upon the demised land, he will be more easily persuaded to pay his rent. That is the object of inserting in a lease a covenant of this kind, and that, doubtless, was the reason for inserting this covenant here. It stands to reason that it must have been so. But the houses have not been erected, and the lessor has not got that security for his rent for which he contracted. It may be that he has miscalculated the value of the houses, and that they would not bring him in the whole rent of 50*l.* a year, but at any rate they would bring him a large portion of it. Even on the defendant's own shewing they would bring him 25*l.*, or half the rent. The defendant's answer to that, as

I understand it, is this, that he has erected a large number of other buildings on this land. He is carrying on there a large brick-making business, and in connection with that business and in connection with the colliery, he has erected divers buildings—offices, an engine-house, stables, &c.—all of which cost a considerable sum of money; and if they remain there and are kept up and the colliery and brick-making business continue, there will at any rate be a considerable security for the rent. An endeavour is made to shew that that will be a better security for the rent than the erection of the seven houses referred to in the covenant, and that therefore there is no reason to suppose that the plaintiff will not be adequately compensated in damages. In determining that question one has always to consider what the damages will be. Now, I understand the Court of Appeal, in laying down the test as to the remedy not being adequately measured by damages, to mean such damages as can be assessed by the Court upon well-established principles. It is agreed here that the measure of damages will be the damage to the reversion at the end of the term by the non-erection of the houses less a discount for payment down. The lease has ninety years to run, and the discount will swallow up practically all that could be recovered on that head, so that the argument really amounts to this, that the plaintiff is entitled to no remedy. He is not entitled to specific performance, it is said, because his remedy can be adequately measured in damages, and he is not entitled to damages, because no damages can be assessed on any known principle of law. Why are the damages, if any, which he can recover, the real measure of importance to him of having the cottages built? It is said for this reason that there are all these other buildings on the land, which are an equivalent. To test that, I asked counsel what security the lessor had that these buildings should be yielded up at the expiration of the lease. I was told that under the building covenant the lessee was bound to maintain them. But I cannot find any such provision. Under that covenant he was bound to build seven dwelling-houses, with suitable outbuildings thereto, and to maintain not any buildings erected on the land, but the said dwelling-houses and all other buildings connected therewith. Obviously that does not apply

KEKEWICH J. 1905 MOLYNEUX v. RICHARD.

to these buildings, which he was under no obligation to erect. Therefore he may let them go into decay, or convert them to some other purpose which would be of no use as security for rent. That is no security in the sense in which I have endeavoured to explain the meaning of security for rent. Therefore we are reduced to the plain question whether pecuniary damages will be an adequate remedy for the non-performance of this covenant, quite irrespectively of the other buildings on the land. Argument is scarcely required for that. Putting it at the lowest, the expenditure of 120*l.* per house, which is the price at which the defendant's witnesses say the houses can be built, must be some security; and even if the houses only produce a net rental of 25*l.*, which strikes me as a very low estimate, still there is half the rent secured. It seems to me that this case is brought within the exceptions laid down by the Court of Appeal, and that the plaintiff is entitled to specific performance.

Solicitors: *Guscotte, Wadham & Co., for Sparkes, Pope & Thomas, Exeter; Spencer Chapman & Co., for J. R. Richards, Swansea.*

H. B. H.

In re FRIEND'S SETTLEMENT. COLE *v.* ALLCOT.

[1905 F. 267.]

FARWELL J.

1905

Nov. 3, 4.

Settlement by Deed—Construction—"Survivors" read "Others"—Stirpital Survivorship.

In 1836 real estate was by deed settled upon trusts for the six daughters and one son of A. for their respective lives as tenants in common, with remainder as to the share of each tenant for life to his or her child or children who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry, and if more than one as tenants in common in fee; provided that if any one or more of the seven tenants for life should die without issue, or leaving issue and such issue being a son should die under the age of twenty-one, or being a daughter should die under that age without having been married, then the original as well as the accrued share of any such tenant for life should go and be equally divided between "the survivors and survivor" of them the said seven tenants for life and their, her and his issue respectively for such estates and interests and in such shares and proportions in all respects as the original shares of the seven tenants for life were directed to be divided: and there was an ultimate limitation to the settlor in fee if all the seven tenants for life died without leaving issue who should live to attain twenty-one or marry as aforesaid. Four of the tenants for life died without issue. Another married and died leaving one child, who attained twenty-one and afterwards died. Another married and died leaving several children, all of whom attained twenty-one, and some of whom were still living. One tenant for life was still living:—

Held, following *Cole* v. *Sewell*, (1843) 4 D. & War. 1; on appeal, (1848) 2 H. L. C. 186, that the same principles applied in construing a deed and a will.

Held, also, that the words "survivors and survivor" must be construed "others and other," and that all the children of tenants for life who respectively attained twenty-one acquired absolute vested interests, irrespective of whether they did or did not survive deceased tenants for life or the tenant for life who was still living.

In re Bilham, [1901] 2 Ch. 169, distinguished.

Waite v. *Littlewood*, (1872) L. R. 8 Ch. 70, and *Lucena* v. *Lucena*, (1877) 7 Ch. D. 255, discussed.

ADJOURNED SUMMONS.

W. Friend by a deed of release dated January 25, 1836 grounded on a lease for a year, settled freehold hereditaments to

FARWELL J. 1905 FRIEND'S SETTLEMENT, *In re.* COLE *v.* ALLCOT.

certain uses (since determined) with remainder to the use of trustees, their heirs and assigns, upon trust to pay the rents and profits of the said hereditaments unto and equally between the six daughters of R. M. Morey, deceased, and James Morey, the son of the said R. M. Morey, as tenants in common, for their respective lives; and from and after the respective deaths of them, the said six daughters of the said R. M. Morey and the said James Morey, as and when they should respectively die, upon trust that the trustees or trustee for the time being should convey the share or shares of such one or more of them so dying unto and equally between their, his and her child and children who, being a son or sons should live to attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and their respective heirs and assigns as tenants in common, such child and children respectively and their respective heirs and assigns taking the same shares of and in the said hereditaments as their respective parents took or were entitled to take of and in the rents and profits thereof: "Provided always, that if any one or more of the said six daughters of the said R. M. Morey or the said James Morey shall die without issue, or leaving issue and such issue being a son or sons shall die under the age of twenty-one years, or being a daughter or daughters shall die under the said age of twenty-one years without being or having been married, then and in such case the share or shares of her, him or them so dying, as also the share or shares which by virtue of this present proviso shall have survived to them, him or her of and in the said hereditaments and the rents and profits thereof, shall go to and be divided unto and equally between the survivors and survivor of them the said six daughters of the said R. M. Morey and the said James Morey and their, her and his issue respectively for such estates and interests in such shares and proportions and in such manner in all respects as the original shares of the said six daughters of the said R. M. Morey and the said James Morey and their issue respectively are hereinbefore directed to be divided." Then followed a gift over, if all the said six daughters and the son of R. M. Morey should die without issue, or having issue and such issue being a son or sons should die under the age of twenty-one years, or being a daughter or daughters

should die under that age without having been married, to the use of the settlor, his heirs and assigns.

The six daughters and the son of the said R. M. Morey were as follows :—

(1.) Maria Morey, who died in February, 1843, a spinster.

(2.) Matilda Morey, who married M. Inman and died in April, 1865, having had one child only, namely, Matthew Inman, who attained twenty-one, and afterwards assigned his interests under the settlement to the defendant Allcot. Matthew Inman died in 1886.

(3.) Elizabeth F. Morey, who married G. Carey and died in June, 1868, without issue.

(4.) Agnes Morey, who married H. Barnes and died in 1877, without issue.

(5.) Mary Caroline Morey, who married J. Sabben and died in March, 1897, having had issue six children, who respectively attained the age of twenty-one years. Two of these children were the defendant Mary Dickin, the wife of the defendant J. B. Dickin, and the defendant Eliza Whish, the wife of the defendant H. F. Whish; and three of these children (other than the defendants Mary Dickin and Eliza Whish), had assigned their interests under the settlement to the defendant J. B. Dickin, and had afterwards died before 1901.

(6.) The defendant Rose Morey, who was a spinster.

(7.) James Morey, who died in 1901 without issue.

Under a power of sale in the settlement, the settled hereditaments had been sold and were now represented by a sum of 8658*l.* 9*s.* 3*d.* consols. On the death of James Morey, in 1901, the question arose as to who were entitled to his share. Thereupon the plaintiff, who was the surviving trustee of the settlement, took out an originating summons for the determination of the following (among other) questions :—1. Whether, upon the true construction of the settlement, the gifts over therein contained upon the deaths without issue of the tenants for life (being the six daughters and son of R. M. Morey) took effect in favour of the children of the other tenants for life, irrespective of such tenants for life or any children of them respectively being living when such gifts over took effect. 2. Or whether such gifts over took

BIBL. LONDIN UNIV

FARWELL J. 1905 FRIEND'S SETTLEMENT, *In re.* COLE *v.* ALLCOT.

effect only in favour of the children of tenants for life who, or children of whom respectively, were living when such gifts over took effect. 3. Or whether such gifts over took effect only in favour of children living when such gifts over took effect to the exclusion of children then dead.

Jenkins, K.C., and *Paice*, for the plaintiff.

R. J. Parker, for the defendant Allcot. On a question of construction like the present, no distinction should be made between a will and a deed: *Doe* v. *Wainewright.* (1) Here the words "survivors and survivor" cannot be construed literally, or the gift over will be rendered absolutely nugatory. They should be construed as "others and other." The scheme of the settlement is that each share is limited to a child of R. M. Morey and his or her children, with a gift over that merely carries the accrued share or shares. It is true that in *In re Bilham* (2) Joyce J. construed the word "survivors," in a somewhat similar gift, to mean "survivors in stock," and based his decision on the remarks of Lord Selborne in *Waite* v. *Littlewood* (3) and of Cotton L.J. in *Lucena* v. *Lucena* (4), and refused to follow the Irish case of *O'Brien* v. *O'Brien.* (5) But the form of the gift over in this case distinguishes it from *In re Bilham.* (2) It is to the survivors or survivor of the seven tenants for life and their, her and his issue respectively for such estates and interests, &c., in all respects as the original shares of the seven tenants for life and their issue respectively are directed to be divided. That refers one back to the original gift to see how the issue are to take, and on referring back one finds the gift to the issue in no way depends on any survivorship, but merely on attaining twenty-one years or marrying. On this construction "survivors" should be read "others," and Matthew Inman takes an interest in James Morey's share.

[FARWELL J. I think I have words here that take this case out of *In re Bilham.* (2)]

The real importance of that case consists in what Joyce J. said

(1) (1793) 5 T. R. 427.
(2) [1901] 2 Ch. 169.
(3) L. R. 8 Ch. 70, 73.
(4) 7 Ch. D. 255, 270.
(5) [1896] 2 I. R. 459.

when dealing with *Lucena* v. *Lucena* (1) and *Waite* v. *Littlewood*. (2) But in *Lucena* v. *Lucena* (1) the Court of Appeal held that "surviving" meant "other," and in *Waite* v. *Littlewood* (2) the present point did not arise.

[FARWELL J. I do not think I need trouble you any further, because of the words that I have in this case.]

E. P. Hewitt, for J. B. Dickin. It is to my interest to cut out Matthew Inman, because I shall then get a larger share. My contention is that "survivors" means, not "others," but "surviving stocks." *Doe* v. *Wainewright* (3) does not decide that a deed must be construed precisely as a will, and the fact that this settlement is a deed is not immaterial. It is submitted that the Court should be more strict in dealing with a deed than with a will. To adopt here the construction of "survivors in stocks" does less violence to the words of the settlement than if the word "survivors" is construed "others." In *Waite* v. *Littlewood* (2) Lord Selborne suggests that the testator in that case probably meant that whenever there was a failure of a particular stirps the share of that stirps should accrue to the other stirps, and then he says (4): "I think there is certainly a very strong probability that anyone using the word 'survivor' does not precisely mean 'other' by it, but has in his mind some idea of survivorship": and in *Lucena* v. *Lucena* (1) the same question arose as here, and Cotton L.J. states that where *all* the children's shares are settled, as is the case here, "surviving" means surviving in person or in issue; but where all the shares are not settled it ought to be read "others." That construction was adopted by Joyce J. in *In re Bilham* (5), and the decision is right in principle and in accordance with the authorities. Here "survivors" must be construed as meaning "survivors in stock."

F. E. Farrer, for Mrs. Dickin and for Mr. and Mrs. Whish, adopted the same line of argument, and submitted that the three children of Mrs. Sabben who predeceased James Morey took no interest in his share.

W. R. Sheldon, for Rose Morey. I rely on *In re Bilham* (5),

(1) 7 Ch. D. 255.
(2) L. R. 8 Ch. 70.
(3) 5 T. R. 427.
(4) L. R. 8 Ch. 73.
(5) [1901] 2 Ch. 169.

FARWELL J. 1905 FRIEND'S SETTLEMENT, *In re.* COLE *v.* ALLCOT.

where the words are substantially the same as in the present case, and I submit that the word "survivor" must be construed as meaning stirpital survivorship.

FARWELL J. This question arises on the construction of a deed, but the authorities shew conclusively that the same principles apply in construing a deed and in construing a will. In *Cole* v. *Sewell* (1) Lord St. Leonards says (2): "It has been insisted that *Doe* v. *Wainewright* (3) is not an authority to rule this case, and that it has not been acted on with respect to deeds: but I cannot agree with this position, for I have always thought that the judges in that case only applied to deeds that sound and sensible construction, which had previously been confined to wills." That case went to the House of Lords, and the decision of the Irish Lord Chancellor was affirmed; and Lord Brougham, in considering the construction of the word "survivors" having regard to its being in a deed, says (4): "My noble and learned friend also called your Lordships' attention to the other point in the case, that is, with respect to the expression 'survivor or survivors.' Now, certainly I am of opinion that there is no ground for saying, for I have watched it very narrowly, that Lord Eldon threw any discredit upon the doctrine which has been laid down in other cases, viz., that 'survivor or survivors' may, regard being had to the circumstances, operate at the word 'other' or 'others.'" And he says (5): "Then it is said in the Court below that this is a settlement and not a will, and what signifies the intention in a settlement? My Lords, there never was a greater fallacy, and I think I must take this opportunity of reprehending the fallacy, of saying that we are not to construe a settlement or any other instrument inter vivos in the same way as we should construe a will, but that we are to adopt a totally different rule of construction in the two cases; in other words, that we are to attend to the intention in the case of a will, and not to care for the intention in the case of a settlement." In the present case, therefore, I regard this point

(1) 4 D. & War. 1; 2 H. L. C. 186.
(2) 4 D. & War. 33.
(3) 5 T. R. 427.
(4) 2 H. L. C. 234.
(5) Ibid. 236.

in exactly the same way as I should were I construing a will. Now, apart from authority, I should have no doubt whatever as to the true meaning of this deed. The trusts are for the six daughters and the one son of R. Morey during their respective lives as tenants in common, and from and after their respective deaths the share of each tenant for life goes to his or her children at twenty-one or marriage. There is no necessity for the children to survive their parents; it is simply an ordinary gift to the children in remainder after the death of the parents. Then comes the proviso that in case one or more of the six daughters or the son "shall die without issue, or leaving issue and such issue being a son or sons shall die under the age of twenty-one years, or being a daughter or daughters shall die under the age of twenty-one years without being or having been married," then the original and accrued share of the person so dying is to be divided "unto and equally between the survivors and survivor of them, the said six daughters and the said son and their, her and his issue respectively, for such estate and interests, in such shares and proportions and in such manner in all respects as the original shares of the said six daughters and the said son and their issue respectively are hereinbefore directed to be divided." I am, therefore, thrown back on the original gift to see what that was, and I find that it was to the daughters and son respectively for life, with remainder to their respective children at twenty-one or marriage, without any necessity for the children to survive their parents or anybody else. I am wholly at a loss to see what right I have to cut down the vested interests which appear to me to be clearly given to the children of the son and six daughters so as to make them contingent on their surviving any one of the tenants for life. If I did so, the accrued shares would not go "in the same manner in all respects" as the original shares, and I should be disregarding the plain words of the instrument. Whether, if that clause were not there, I should or should not have thought myself bound by the recent decision of Joyce J. in the case of *In re Bilham* (1) it is not necessary for me to consider: but I should like to make this suggestion with regard to the observations of Lord Selborne in *Waite* v.

(1) [1901] 2 Ch. 169.

FARWELL J. 1905 FRIEND'S SETTLEMENT, *In re.* COLE *v.* ALLCOT.

Littlewood (1) and of Cotton L.J. in *Lucena* v. *Lucena* (2) that have been cited to me. Those learned judges were considering what element of survivorship could be found that would justify them in reading "survivors" as "others," and suggested that it might be found in the survivorship of stocks, or, as Cotton L.J. puts it in *Lucena* v. *Lucena* (3), "survivors in person or in issue taking an interest under the will"—that is, as I understand him "taking a vested interest in the original gift to them." This survivorship may well be a survivorship, not of individuals, but of estates or interests. For instance, assume the original gifts are to the life tenants' children who attain twenty-one, and that when A., the last surviving life tenant, died without issue, one of his brothers had predeceased him leaving a child who attained twenty-one but died before A., and another had predeceased him leaving a child who survived A. but died before attaining twenty-one. The first stirps having acquired a vested interest under the original gift has survived, so that the original gift is capable of increase by way of accruer: the latter stirps has not, although by the survival of the individual it had the possibility of doing so. This construction appears to me to preserve the idea of survivorship, and to allow the words of the original gift to apply unaltered to the accruing share, while any other construction must attribute a meaning to the gift of accruer other than that applicable to the original gift, notwithstanding that both shares are treated as going over together and raises the difficulty—what is that construction to be? The result in this case is that I hold "survivors" means "others," and that the children of the tenants for life need not survive the last propositus, James Morey, or his surviving sister. That answers the first three questions, and there will be a declaration on that footing.

Solicitors: *Paice & Cross; Stow, Preston & Lyttelton, for J. Leake, Shifnal.*

H. L. F.

(1) L. R. 8 Ch. 70, 73 (2) 7 Ch. D. 255.
(3) 7 Ch. D. 270.

DAVY *v.* SCARTH.

FARWELL J.

1905

Nov. 10.

[1903 D. 1679.]

Partnership—Partner appointed Receiver—Receiver's Remuneration—Officer of the Court—Receiver, qua Partner, indebted to Partnership.

A partner, who is appointed receiver of the partnership assets by the Court on the usual terms, is entitled to be paid his remuneration and costs as receiver out of the funds in his hands as receiver, although as a partner he is indebted to the partnership and is unable to pay what he owes.

H. Davy and A. Scarth were partners in business at Leeds. The partnership was dissolved by the death of H. Davy on June 30, 1903, and subsequently his executrix, the plaintiff, commenced this action against A. Scarth for the usual partnership accounts.

On October 16, 1903, the defendant was appointed receiver on giving security to receive, collect, and get in the partnership accounts.

On March 14, 1904, an inquiry was directed of what the partnership assets consisted, and it was ordered that the partnership property and effects should be sold.

On July 25, 1905, the master filed his certificate whereby it appeared that there was due from the partnership to the plaintiff, as executrix of H. Davy, deceased, the sum of 1464*l.* 5*s.* 10*d.*; that there was also due to the partnership from the defendant Scarth 1457*l.* 19*s.* 5*d.*; and that there was in the hands of defendant Scarth, as receiver, 1392*l.* 12*s.* 8*d.* It also appeared from the certificate that the master had allowed the receiver 280*l.* for his remuneration, and 48*l.* 1*s.* 6*d.* for his costs, making altogether 328*l.* 1*s.* 6*d.*

The action now came on for hearing on further consideration. It appeared that the defendant Scarth was unable to pay any part of the 1457*l.* 19*s.* 5*d.* he owed to the partnership. It also appeared that the creditors of the partnership had been paid 10*s.* in the pound, leaving some 1400*l.* still due to them.

The question was whether, under the circumstances, the

FARWELL J. 1905 DAVY v. SCARTH.

defendant was entitled to deduct the 328*l.* 1*s.* 6*d.* from the 1392*l.* 12*s.* 8*d.* in his hands as receiver, notwithstanding that he was unable to pay what he owed as partner.

Elgood, for the plaintiff. There is no direct authority on the point. It is settled that a debt due from a firm to a partner must be paid before the costs of the winding up: *Hamer* v. *Giles* (1); *Austin* v. *Jackson* (2); *Potter* v. *Jackson* (3); and that a partner must make good all he owes to the partnership before receiving any of his costs of the action: *Ross* v. *White*. (4) It is submitted that a partner, who is unable to pay what he owes to the partnership, cannot by being receiver benefit himself at the expense of the partnership. Here, the 328*l.* 1*s.* 6*d.* should be set off against the debt the defendant owes to the partnership, and he ought to be ordered to pay over the whole of the sum in his hands as receiver.

Upjohn, K.C., as amicus curiæ, referred to *In re Regent's Canal Ironworks Co.* (5)

Luxmoore, for the defendant. The defendant is only bound to pay into Court the 1392*l.* 12*s.* 8*d.*, less the amount allowed him for his remuneration and costs. The fact that as a partner he is indebted to the firm makes no difference. As receiver he is an officer of the Court and should be protected. He has wound up the estate properly, and at any rate his costs of winding it up are a first charge on the funds in his hands.

Elgood, in reply.

FARWELL J. It is curious that there should be no authority on this point. The defendant was a partner in the firm, and he was appointed receiver in the usual way and on the usual terms. The partnership accounts have been taken and shew the defendant a debtor to the firm for some 1400*l.*, and that as receiver he has a balance in his hands of 1392*l.* 12*s.* 8*d.* The master has allowed him 280*l.* for his remuneration as receiver. The question is whether he is bound to pay over the 1392*l.* 12*s.* 8*d.* without

(1) (1879) 11 Ch. D. 942.
(2) (1879) 11 Ch. D. 942, n.
(3) (1880) 13 Ch. D. 845.
(4) [1894] 3 Ch. 326.
(5) (1875) 3 Ch. D. 411, 416, 419.

deducting that remuneration, or whether he is entitled to deduct it from the sum which is in his hands as receiver. On principle, I think the latter is the true view, because, although he was a partner, he is also an officer of the Court appointed for the convenience of both parties and on the terms that he should do certain work and be paid remuneration therefor. It was an arrangement sanctioned by the Court, and, as pointed out in the case of *In re Regent's Canal Ironworks Co.* (1), to which I have been referred, the honour of the Court is involved in seeing that the arrangement is fulfilled with the utmost punctuality by the parties thereto, not of course (as in that case) at the expense of third persons. It is not suggested that he has not done the work properly. I think he is entitled to have the remuneration, irrespective of his debt to the partnership, so as to keep himself alive while he is doing his work as receiver. The same principle applies to the 48*l.* 1*s.* 6*d.* which has been allowed him for his costs as receiver. The order will be that the defendant be at liberty to retain the 328*l.* 1*s.* 6*d.* out of the 1392*l.* 12*s.* 8*d.* in his hands and that he pay over the balance to the plaintiff, the latter undertaking to apply the same in and towards payment of the debts of the partnership.

Solicitors: *Emmet & Co., for E. Huntriss, Halifax; Oscar Edmonds, for Palethorpe, Leeds.*

(1) 3 Ch. D. 411, 416, 419.

H. L. F.

SWINFEN EADY J.

1905

Oct. 25; *Nov.* 8.

In re GIST.
GIST *v.* TIMBRILL.

[1905 G. 876.]

Administration—Personal Estate—Intestacy—Lunatic—Advances to Brothers and Sisters—Stipulation as to Hotchpot—Deceased Sister's Children taking by Representation—Statute of Distribution (22 & 23 *Car.* 2, *c.* 10), *ss.* 6, 7.

A bachelor lunatic died intestate leaving a brother, a sister, and the children of a deceased sister his sole next-of-kin.

The deceased sister had received an advance from the lunatic's property under an order of the Lunacy Court, which order, with her consent, directed that the advance should be taken and considered as part of any share to which she might become entitled in the lunatic's estate at the time of his decease in the event of her surviving him :—

Held, that the deceased sister's children, though only taking a share as legally representing their mother, under ss. 6 and 7 of the Statute of Distribution, were not bound to bring the advance into hotchpot.

Proud v. *Turner*, (1729) 2 P. Wms. 560, distinguished.

Lloyd v. *Tench*, (1751) 2 Ves. Sen. 213, 215, explained.

ORIGINATING SUMMONS.

Samuel Gist, a bachelor, was found a lunatic on August 4, 1852. The sum of 3500*l.* a year was allowed by the Court for his maintenance, but as his income largely exceeded that amount, certain allowances were subsequently made to his brother Henry and his sisters Marianne and Ann for their maintenance and support.

At the time these allowances were made the presumptive next-of-kin of the lunatic were his brother Henry and his sisters Marianne, Ann, and Elizabeth. Henry was also his heir-presumptive.

By an interim order in lunacy, dated March 21, 1874, and made on Henry's application for a yearly allowance of 500*l.*, it was ordered that the sum of 200*l.* be allowed out of the lunatic's income to Henry for his immediate requirements, and further directions were reserved until the master had made a report as to the lunatic's income.

By a second order, dated March 21, 1874, and made on

Marianne's application, she and her husband consenting that the sums which should be advanced to her from time to time pursuant to this order should be taken and considered as part of any share to which she might become entitled of and in the estate of the said lunatic at the time of his decease in the event of her surviving him, it was ordered that until further order the sum of 300*l.* per annum be allowed out of the lunatic's income as from March 4, 1874, to Marianne for her maintenance and support, and also the sum of 100*l.* in addition for her immediate requirements, and it was ordered that the sums which should be so advanced be taken and considered as part of any share to which Marianne might become entitled of and in the estate of the said lunatic at the time of his decease in the event of her surviving him.

By a third order, dated January 30, 1875, and made on Henry's application, the sum of 500*l.* per annum from March 21, 1874, was allowed to Henry on similar conditions as to accounting.

By a fourth order, dated March 10, 1877, and made on Ann's application, the sum of 300*l.* per annum from March 21, 1874, was allowed to Ann on similar conditions as to accounting.

Owing to the diminution of the lunatic's income it became necessary to reduce the various allowances.

By a fifth order, dated April 1, 1882, and made on the application of the committee of the estate in the presence of the brother and three sisters, it was ordered that as from March 25, 1882, the following annual sums be allowed for the maintenance of the lunatic and the members of his family in substitution for the several allowances ordered to be made hitherto for that purpose, viz., 275*0l.* per annum to the lunatic, 235*l.* per annum to Marianne, 395*l.* per annum to Henry, and 235*l.* per annum to Ann.

By subsequent orders of June 3, 1886, and March 14, 1894, made on the application of the committee in the presence of the brother and three sisters, the various allowances were further reduced.

The last three orders contained no direction that the reduced allowances to the brother and two sisters should be taken and considered as part of their shares of the lunatic's estate.

SWINFEN EADY J.

1905

GIST, *In re.* GIST v. TIMBRILL.

Marianne died on March 15, 1895, leaving three children, Mary, Emily, and Eleanor, all of whom were now of age. They had not received any allowance. The lunatic's sister Elizabeth died a spinster on January 9, 1896.

The lunatic died a bachelor and intestate on August 19, 1904, leaving his brother Henry, his sister Ann, and his nieces Mary, Emily, and Eleanor his next-of-kin.

On September 3, 1904, Henry took out letters of administration to the lunatic's estate.

This summons was issued to determine what sums (if any) the various parties must bring into account, and in particular whether the nieces must bring their mother's advances into account.

J. K. Young, for the brother Henry. The first order does not contain the direction as to accounting, but the second, third, and fourth orders contain that direction, according to the usual practice: *In re Frost.* (1) The subsequent orders merely substitute reduced allowances to which the original direction attaches. Henry must therefore bring into account all sums received except the first 200*l.*

Micklem, K.C., and *Johnston Edwards*, for the sister Ann. The parties are not bound to account for sums received under the fifth and subsequent orders, which contain no direction in that behalf. These orders were made on the application of the committee in the presence of the brother and three sisters, and the direction was presumably omitted by mutual arrangement.

The nieces, however, must bring their parent's advances into hotchpot. As a brother and sister of the intestate are still living, the nieces do not take in their own right as collateral next-of-kin under ss. 6 and 7 of the Statute of Distribution, but only as representing their mother: *Lloyd* v. *Tench* (2); *In re Ross's Trusts* (3); approved in *In re Natt.* (4)

They therefore only take per stirpes the share which their mother would have taken if living, which share was subject to hotchpot for advances under the second lunacy order.

(1) (1870) L. R. 5 Ch. 699, 702.
(2) 2 Ves. Sen. 213, 215.
(3) (1871) L. R. 13 Eq. 286, 293.
(4) (1888) 37 Ch. D. 517, 524.

In *Proud* v. *Turner* (1) it was held that as the issue of a deceased child took that child's share by representation, the share was bound by the hotchpot provisions of s. 5, which provides for descendants, and the issue were bound to bring their parent's advances into hotchpot. The effect of the lunacy orders is to add a similar hotchpot clause to ss. 6 and 7, which provide for collaterals.

Eve, K.C., and *H. B. Howard*, for the nieces Emily and Eleanor. The lunacy orders only provide for hotchpot in case the parent survives the lunatic. This refers to actual and not stirpital survivorship. The orders could not bind the spes successionis of the nieces in their absence, either directly or by adding a hotchpot clause to ss. 6 and 7. In *Proud* v. *Turner* (1) there was a statutory obligation to bring advances into account. The present obligation is merely contractual, and cannot bind strangers. As the brother and sister are living, the nieces no doubt take per stirpes under ss. 6 and 7, but that rule merely determines the fractional amount of their share, and does not render them liable to their parent's contract to charge it with advances. They do not really take through their parent at all.

Gatey, for the niece Mary. I adopt the same argument. The second lunacy order was merely a contract between Marianne and the Court, and could not bind the nieces who were not before the Court. A so-called mortgage or charge on a spes successionis is merely a personal contract, and can only be enforced if and when the interest falls into the possession of the mortgagor: *In re Parsons* (2); *In re Dallas.* (3)

In the present case Marianne never attained any interest, and her contract could not bind her children's interest.

Cur. adv. vult.

Nov. 8. SWINFEN EADY J. The claim that Marianne's children are to bring into hotchpot, on the division of the estate of the intestate, the sums advanced or paid to their mother,

(1) 2 P. Wms. 560. (2) (1890) 45 Ch. D. 51.
(3) [1904] 2 Ch. 385.

SWINFEN EADY J.

1905

GIST, *In re.* GIST v. TIMBRILL.

under orders of the Court in Lunacy, is based on the contention that, under the Statute of Distribution, where the intestate has left a brother or sister surviving him, children of a deceased brother or sister stand in the place of their parent, and take only the share which their deceased parent would have taken if living; that they do not take any share in their own right, but as "legally representing" their parent, and can only receive what their parent would have received if living. The second order of March 21, 1874, under which moneys were paid to Marianne, recites the consent of Marianne and her husband that the sums which should be advanced to her pursuant to that order should be taken and considered as part of any share to which she might become entitled of and in the estate of the said lunatic at the time of his decease in the event of her surviving him, and the same order directs that the sums which should be so advanced are to be taken and considered as part of any share to which Marianne might become entitled of and in the estate of the said lunatic at the time of his decease, in the event of her surviving him. The contention is that if Marianne had survived the lunatic she would have had to bring these sums into account, and as her children "legally represent" her within the meaning of the statute, they can only take the share which she, if living, would have been entitled to.

In my opinion the answer to this argument is that the children take the share to which the parent would have been entitled under the statute, and without reference to any bargain made by the parent in her lifetime, or any alienation or disposition of any expectant interest or possibility of succession. The payments to Marianne were payments to a person in narrow circumstances for maintenance, and as between father and child would not have been advancements by portion within the statute. There is not any provision in the statute requiring these sums to be brought into account. The order in lunacy only directs these sums to be brought into account if Marianne survive the lunatic, an event which did not happen. Marianne and her husband could bind the interest of the former if she survived to take a share in the estate of the lunatic; but she could no more bind her children, on her dying in the

lifetime of the lunatic, in the event of his leaving a surviving brother or sister, than she could bind her children in the event of all the brothers and sisters dying in the lifetime of the lunatic, and all nephews and nieces taking equal shares per capita.

With regard to the authorities. In *Proud* v. *Turner* (1), the deceased child would have been bound if living to bring into hotchpot under the statute the amount of the advancement; and as the child's issue stood in his place and stead it was decided that they were bound to bring in the like amount, as they could not be in any better position. Much reliance was placed on a passage in *Lloyd* v. *Tench* (2): "But it is now settled, that though the children of one brother stand in place of the parent, in sharing with the other brother, and take per stirpes, yet if no brother is alive, that representation in loco parentis is at an end." This passage, however, has no reference whatever to the amount of a nephew's or niece's share being reduced by anything done in the parent's lifetime. It merely points out when a distribution between nephews and nieces is per stirpes and when per capita.

Henry and Ann must bring into account the amounts received by them respectively, as they have agreed to do so and have survived the lunatic. The reduced amounts mentioned in the subsequent orders stand exactly on the same footing. Although the directions were not repeated in each order, the amounts allowed were in substitution for the previous allowances, and must be taken to have been made on the same footing. The first advance to Henry—namely, the 200*l.* under the first order of March 21, 1874—will not be brought into account, as there is no direction to that effect, and no consent or undertaking by Henry in that behalf. The costs of all parties of this application are to be paid out of the estate.

Solicitors: *Routh, Stacey and Castle, for Stapleton & Son, Stamford; Belfrage & Co.; Bloxam, Ellison & Co., for Bryan & Helps, Gloucester.*

(1) 2 P. Wms. 560. (2) 2 Ves. Sen. 213, 215.

G. R. A.

Explained. Re HALL. [1948] Ch. 437

Considered. Re JEEVES. [1949] Ch. 49

JOYCE J.
1905
Nov. 2, 18.

In re WALBRAN.
MILNER *v.* WALBRAN.

[1905 W. 1845.]

Will — Construction — Gift "to be equally divided between the Children of A. and B."

Testatrix directed one moiety of the proceeds of sale of her real estate "to be equally divided between the children of F. W. and J. W. or their heirs." F. W. and J. W. were nephews of the testatrix. F. W. had six children living at the death of the testatrix. For five years previous to the date of the will he had not lived with his family. J. W. had two children living at the death of the testatrix:—

Held, that the gift was to J. W. and the children of F. W., and that the division must be into moieties, one going to J. W. and the other to the children of F. W.

ADJOURNED SUMMONS.

Jane Walbran by her will dated September 6, 1903, appointed the plaintiffs to be her executors and trustees. The will then proceeded as follows:—"And I declare that they shall sell all my messuages, lands, tenements and hereditaments situate at or near Felbeck, Pateley Bridge, Yorkshire, and after paying all expenses of duties shall divide the proceeds into two parts. One equal part I leave to John Thomas Walbran, now of Dallas Road, Victoria, British Columbia, and the other equal part to be equally divided between the children of Francis Maximilian Walbran, now or late of No. 9, Marlborough Grove, Leeds, and James Christopher Walbran, No. 420, Smith Street, South Brooklyn, New York, or their heirs." After making several specific bequests, and, amongst others, a legacy to one of the children of F. M. Walbran, the testatrix gave her residuary estate to A. M. Walbran, the wife of the said J. T. Walbran.

The testatrix died on June 26, 1904. J. T. Walbran, F. M. Walbran, and J. C. Walbran were all nephews of the deceased husband of the testatrix. They all survived the testatrix. At her death F. M. Walbran had six children living. For five years prior to the date of the will F. M. Walbran had not resided with his wife and family.

J. C. Walbran had two children living at the death of the testatrix.

This was a summons taken out by the plaintiffs to have it determined who was entitled to the second moiety of the proceeds of sale of the real estate in question.

Pattisson, for the plaintiffs.

Mark Romer, for J. C. Walbran. The true grammatical construction of this disposition is a gift to the children of F. M. Walbran and to J. C. Walbran. In the direction for division the word "between" implies a division into two parts, so that J. C. Walbran will take one half of the moiety in question: *Lugar* v. *Harman* (1); *Stummvoll* v. *Hales* (2); *In re Featherstone's Trusts*. (3)

Younger, *K.C.*, and *Goldberg*, for the children of F. M. Walbran. The gift is to the children of F. M. Walbran and to J. C. Walbran: *In re Featherstone's Trusts* (3), and *Hawes* v. *Hawes*. (4) The grammatical construction should be adopted unless there is anything upon the face of the will to shew a contrary intention. But, as to the mode of division, we submit that it should be per capita, and not per stirpes: *Dowding* v. *Smith*. (5)

Hughes, *K.C.*, and *Method*, for the children of J. C. Walbran. The children of J. C. Walbran take, and not he personally: *Mason* v. *Baker* (6), and *In re Davies' Will*. (7)

Hawes v. *Hawes* (4) was a very plain case in which no other decision was possible.

The children of A. and B. means the children of both: *Wicker* v. *Mitford*. (8) The distribution should be per capita: *Lady Lincoln* v. *Pelham*. (9) We also rely on *Fletcher* v. *Fletcher*. (10)

Romer, in reply. The will must be construed first, before the admission of extrinsic evidence: *In re Grainger*. (11)

Cur. adv. vult.

(1) (1786) 1 Cox, 250.
(2) (1864) 34 Beav. 124.
(3) (1882) 22 Ch. D. 111.
(4) (1880) 14 Ch. D. 614.
(5) (1841) 3 Beav. 541.
(6) (1856) 2 K. & J. 567.
(7) (1860) 29 Beav. 93.
(8) (1782) 3 Bro. P. C. 442.
(9) (1804) 10 Ves. 166.
(10) (1882) 9 L. R. Ir. 301.
(11) [1900] 2 Ch. 756; [1902] A. C. 1.

JOYCE J. 1905 WALBRAN. *In re.* MILNER *v.* WALBRAN.

Nov. 18. JOYCE J. (after reading the will). Now, just as to determine what is the effect of a gift to A. or B. you must know who A. and B. are (see *In re Sibley's Trusts*) (1), so in order to determine the effect of a bequest to the children of A. and B. you must know something about A. and B.

Notwithstanding anything that may have been or may be said to the contrary, I do not doubt that the proper grammatical meaning of the expression "the children of A. and B."—the preposition "of" not being repeated before B., and A. and B. not having or being capable of having children together—is, the children of A. and the individual B., not his or her children. But the expression "the children of A. and B." may mean the children of A. and the children of B.; and, in a will, must have that meaning if B., to the knowledge of the testator, be dead, leaving children still alive.

In the present case A. and B. are both alive. Each is a nephew of the testatrix. But A., i.e., Francis, had deserted, or, at all events, was living away from, his family. On the other hand, no reason has been suggested why the testatrix should have passed over B., i.e., James, in favour of his children. I hold, therefore, that the division must be between James—not his children—and the children of Francis.

Then as to the mode of division. The gift is not to the children of A. and B. as tenants in common, or in equal shares, but it is "to be equally divided between the children of A. and B." In strictness the word "between"—as its etymology suggests, when it is a case of dividing—implies division into two parts rather than more. Considering the nature of the gift, it would be strange, not to say capricious, to make a class of one nephew and the children of another and divide among them in equal shares. Upon the whole I think the testatrix intended, and the will expresses, a division into moieties—one for the children of the testatrix's nephew Francis and the other for her nephew James.

Solicitors: *Williamson, Hill & Co., for D'Angibau & Malim, Boscombe; Rawle, Johnstone & Co.*

(1) (1877) 5 Ch. D. 494, 499.

G. A. S.

In re STUCLEY.
STUCLEY *v.* KEKEWICH.

C. A.
1905
Oct. 31;
Nov. 2, 3, 6, 7, 8.

[1904 S. 156.]

Vendor's Lien — Unpaid Purchase-money — Personal Estate — Reversionary Interest, Sale of—Trustee Purchaser—Trust Fund—Administration—Interest — Arrears, Recovery of—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, c. 27), *s.* 42.

The doctrine of vendor's lien for unpaid purchase-money is as applicable to a sale of personal estate—such as a reversionary interest in a trust fund—as to a sale of real estate; and accordingly an unpaid vendor of personal estate is entitled to all such remedies for enforcing payment of his purchase-money and interest as he would have been entitled to under an express mortgage or charge.

No Statute of Limitations is applicable to a charge on personal estate, whether by way of vendor's lien or otherwise: consequently the right to the recovery of the debt is not barred by lapse of time, and interest is recoverable for the whole period from the date on which the debt was incurred.

In 1874 a son, being entitled in reversion upon the death of his father to a trust legacy of 5000*l.* under a will of which the father was sole surviving trustee and executor, sold and assigned his reversionary interest to his father by deed absolutely for 1500*l.* The deed expressed that the 1500*l.* was paid as the consideration money by the father to the son, and a receipt for the money was indorsed on the deed, but in fact the money was never paid. In 1900 the father died, whereupon the son claimed a lien for the 1500*l.* upon the 5000*l.* legacy, which was then in the hands of the father's executors, together with interest from the date of the assignment:—

Held, that the son was entitled to enforce his claim on the grounds (1.) that the doctrine of vendor's lien on real estate was equally applicable to personal estate; (2.) that a vendor's lien on personal estate was not subject to any statutory or other bar; and (3.) that, the father having been in the position of trustee of the legacy as well as purchaser, his executors were bound, in due course of administration, to satisfy the son's claim out of the legacy.

Order for payment accordingly, including interest at 4 per cent. per annum from the date of the assignment.

Davies v. *Thomas*, [1900] 2 Ch. 462, followed.

UNDER a testamentary appointment made by the will, dated December 19, 1867, of Lady Elizabeth Stucley, who died on May 9, 1870, her son, the plaintiff Edward Stucley, became

C. A. 1905

STUCLEY, *In re.* STUCLEY *v.* KEKEWICH.

entitled, subject only to the prior life interest of his father, Sir George Stucley, Bart., to a sum of 5000*l.*, being one moiety of a sum of 10,000*l.* invested in a debenture for that amount of the Mersey and Irwell Navigation Company, which debenture was standing in the name of Sir George Stucley as the surviving trustee and executor of the will of Elizabeth, Marchioness of Thomond, deceased (the mother of Lady Stucley), the donor of the power of appointment over the fund.

In 1873 the plaintiff, then an undergraduate of Cambridge University, became involved in financial difficulties.

In January, 1874, Sir George Stucley paid off the plaintiff's liabilities and on January 28, 1874, took transfers of certain mortgage securities which had been executed by the plaintiff, the transfers expressing that they were to stand as security to Sir George for the amount of the liabilities he had so paid off, and for further advances to or for the plaintiff.

By a deed dated January 31, 1874, and made between the plaintiff of the one part and his father, Sir George Stucley, of the other part, after reciting that the plaintiff was, under the said will of his mother, entitled in reversion immediately expectant upon his father's death to the said legacy or sum of 5000*l.*, being one moiety of the said sum of 10,000*l.* secured by the Mersey debenture, and that the plaintiff had contracted with his father for the sale to him of the said reversionary legacy for the sum of 1500*l.*, it was witnessed that in consideration of the said sum of 1500*l.* therein expressed to have been paid to the plaintiff by his father (the receipt for which was indorsed on the deed, signed and witnessed), the plaintiff assigned the said reversionary legacy of 5000*l.* to his father, "his executors, administrators and assigns, as and for his and their absolute property," with full power in the name of the plaintiff to sue for, recover and give effectual discharges for the same. In reality the purchase-money of 1500*l.* was admittedly never paid at all in any form.

In 1874, shortly after the execution of the assignment of January 31, the plaintiff went to Australia, where he remained until after his father's death, which occurred on March 19, 1900. By his will and a codicil thereto, dated respectively June 19, 1895, and July 28, 1896, Sir George appointed executors and trustees.

to whom he bequeathed his residuary personal estate upon certain trusts under which his eldest son, Sir Lewis Stucley, Bart., became entitled to the income thereof during his life. At the death of Sir George Stucley the plaintiff paid to the executors a sum which he said ought, under certain directions in the codicil, to be accepted in full discharge of his liabilities to his father, though this the executors denied; and he then claimed a reassignment to him of the various properties comprised in the securities which had been transferred to his father: and he further claimed payment of the legacy of 5000*l.*, now fallen into possession through his father's death, alleging that the assignment of January 31, 1874, operated, not as an absolute assignment out-and-out to his father, but only as a further security for the sums paid on his, the plaintiff's, behalf by his father. The executors, however, disputed the plaintiff's claim to the legacy, contending (amongst other grounds) that the assignment operated, according to its purport, as an absolute assignment by way of sale to the father.

The plaintiff then, on January 13, 1904, issued the writ in this action against Sir George's executors and trustees (who were also the legal personal representatives of the Marchioness of Thomond) and Sir Lewis Stucley, the tenant for life of his father's residuary estate, claiming a declaration that the assignment had been held by his father as a security only for the sums paid on his, the plaintiff's, behalf, and that the plaintiff was entitled to have the legacy handed over to him: alternatively, a declaration that the plaintiff was entitled to a lien on the legacy for the unpaid purchase-money of 1500*l.*, with interest from the date of the assignment, with other and consequential relief.

The defendants, in their statement of defence, insisted that the assignment was intended by all parties at the time to operate, and did in fact operate, as an assignment by way of absolute sale, and not by way of security only. They also relied upon all statutes and rules of law and equity for the limitation of actions and against stale claims and demands; and they contended further that, even if the sale of the legacy had been originally for any reason invalid, the plaintiff's present claim was barred

C. A. 1905 — STUCLEY, *In re.* STUCLEY *v.* KEKEWICH.

by laches and acquiescence. Issue having been joined, the action came on for trial as a witness action before Farwell J. in November, 1904. No evidence was forthcoming that the 1500*l.* purchase-money had ever been paid, either in cash or in account or by agreed appropriation, or in any other way, and it was, in fact, admitted by the defendants' counsel that it was impossible to argue that the money had ever been paid, at least in cash. It appeared that the 10,000*l.* Mersey bond had been sold and the money re-invested in other securities now standing in the names of Sir George's executors.

On February 14, 1905, Farwell J. delivered judgment, finding, as a fact, that the father took the assignment in consideration of the 1500*l.*, though his Lordship had no sort of doubt that that sum was not taken as cash, and was never intended to be, the very last thing that the parties intended at that time being to trust this young man with 1500 sovereigns; but by some blunder or oversight they did not treat the assignment, as it was intended to be treated, as a payment of a claim due to the father. Accordingly, the principal sum said to be due to the father from the son must be reduced by that 1500*l.* Further than that his Lordship did not see that the plaintiff was entitled to any relief at all, and he therefore dismissed the action with costs. The question of lien raised by the action was not dealt with by the learned judge in his judgment.

The plaintiff appealed.

The appeal was heard on October 31, November 2, 3, 6, and 7.

The only question calling for a full report on the appeal was whether, assuming that the assignment of January 31, 1874, should be treated as an assignment by way of absolute sale by the plaintiff to his father of the reversionary legacy of 5000*l.*, the plaintiff was not entitled to the ordinary vendor's lien upon the fund representing the legacy for the unpaid purchase-money of 1500*l.*, and also for interest thereon from the date of the deed—that is, for more than thirty years—without any bar by statute or otherwise.

Jenkins, K.C., and *George Lawrence*, for the plaintiff, contended, on the evidence, that the assignment was intended by the parties

at the time to be by way of security only to the father for present and future advances to or for the benefit of the son.

Upjohn, K.C., and *Vaughan Hawkins*, for the defendants. We submit that the evidence does not support the proposition that the assignment was other than what it purports to be on the face of it, namely, an absolute assignment by way of sale to the father of this reversionary legacy of 5000*l*. We admit that there is no evidence forthcoming that the 1500*l*. consideration money was ever actually paid in any shape, but we submit that at this distance of time the statement in the deed that the money was paid, coupled with the signed and witnessed receipt indorsed on the deed, ought to be accepted as conclusive evidence. But assuming that is not so, and that the deed should be regarded as an absolute assignment on sale, the action raises the following questions: first, whether the plaintiff is entitled, as he claims to be, to the ordinary vendor's lien for unpaid purchase-money; and, secondly, if he is so entitled to a lien, whether he can claim more than six years' arrears of interest.

Upon the first point, we submit that there is no distinct authority that the doctrine of vendor's lien for unpaid purchase-money is applicable to a sale of personal estate of this kind, a reversionary legacy. It is true that in *Davies* v. *Thomas* (1) it was held by Lord Alverstone M.R. that the doctrine applied to the sale of a share of leaseholds. That was so held upon the authority of *In re Albert Life Assurance Co.* (2) and *Collins* v. *Collins* (3); but those two cases depended solely upon the intention of the parties as shewn by the facts or documents.

The plaintiff here is barred by his laches and delay, for he has waited for over thirty years before proceeding to enforce his lien. A vendor's lien on a reversion is not a reversionary lien to be enforced only when the reversion falls into possession, but becomes enforceable at once, as in *Mackreth* v. *Symmons* (4), which was a case of a sale of a reversionary interest in real estate. In the case of real estate the time limiting the enforcement of a vendor's lien commences to run from the date of the

(1) [1900] 2 Ch. 462, 468.
(2) (1870) L. R. 11 Eq. 164, 178—9.
(3) (1862) 31 Beav. 346.
(4) (1808) 15 Ves. 329.

C. A. 1905 — STUCLEY, *In re.* STUCLEY *v.* KEKEWICH.

completion of the purchase. No doubt the Statutes of Limitations do not, in terms, apply to mortgages or charges on personal estate, but nevertheless Courts of Equity will treat such mortgages or charges by analogy to mortgages or charges on real estate as falling within the spirit and meaning of the statutes: *Hovenden* v. *Lord Annesley.* (1)

[COZENS-HARDY L.J. In *Mellersh* v. *Brown* (2) Kay J. said: "I never heard that a Court of Equity is under any obligation to follow, as regards personal estate, the analogy of a statute which applies to real estate."

STIRLING L.J. *Smith* v. *Hill* (3) is an authority to the same effect.]

Even assuming that neither the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), nor any subsequent Statute of Limitations, is applicable, either directly or by analogy, to a mortgage or charge on personal estate, we submit that in such a case as the present the equitable right to a vendor's lien is not enforceable. The vendor's lien which the plaintiff had here was a lien on the property sold by him, that is, the reversionary interest; that gave him the right, on selling the property, to enforce his lien for his unpaid purchase-money against the purchaser, his right being to have the reversion sold, and his purchase-money paid out of the proceeds. Having abstained from enforcing his remedy against the only property he sold, namely, a reversionary interest, he cannot now enforce it against a different class of property, namely, an interest in possession.

The question is, what is the nature of a vendor's lien, as regards his remedies for enforcing it? He stands, we submit, in a different position from that of a mortgagee or other person having an express charge. It has been said that he has, by virtue of his lien, "an interest" in the property sold; but that is only a figurative expression, intended to convey the idea that he can get something out of the property. That, however, is a different thing from having, as a mortgagee has, something vested in him

(1) (1806) 2 Sch. & Lef. 607, 630—631; see also *Charter* v. *Watson*, [1899] 1 Ch. 175, 180—181.

(2) (1890) 45 Ch. D. 225, 229.

(3) (1878) 9 Ch. D. 143.

separately from the debt itself, that is, the property which is mortgaged or charged. A mortgagee has the security of the property itself, with the right to enforce that security by foreclosure or sale against the mortgagor. An unpaid vendor, on the other hand, has no ownership in the property sold, for the purchaser himself is the owner of the property: the unpaid vendor has no security whatever to sit upon: he has nothing in his hand; he is out of possession, and the purchaser has the whole property vested in himself alone: the vendor cannot touch the ownership; he has no right of foreclosure against the property on which he claims his lien; all he has is a right to sue for and recover his money—his right being merely equivalent to a right to bring an action of detinue for the recovery of a chattel. All the authorities shew the distinction between the case of a mortgagee enforcing his security and that of a vendor asserting his lien. The ground of those authorities is that a mortgagee, in enforcing his rights, can proceed against the property vested in him as security, quite apart from the recovery of the debt itself: *Davies* v. *Thomas* (1); *Mellersh* v. *Brown* (2); *Smith* v. *Hill* (3); *Re Lake's Trusts* (4); *Re Hancock* (5); *London and Midland Bank* v. *Mitchell* (6); *Toft* v. *Stephenson* (7); *Levy* v. *Stogdon.* (8)

If, however, it should be held that this unpaid vendor is not barred by lapse of time from asserting his lien for the 1500*l.* purchase-money, still we submit that he is not entitled to recover more than six years' arrears of interest.

[COZENS-HARDY L.J. referred to *Rose* v. *Watson.* (9)]

As regards interest, at all events, the Court should, in the case of personal estate, follow the principle applicable to real estate under the Statutes of Limitations: *Thomson* v. *Eastwood.* (10)

Lastly, if, as is contended by the plaintiff, this assignment was, by some secret agreement or understanding between the parties, never really intended to operate as an absolute conveyance at

(1) [1900] 2 Ch. 462.
(2) 45 Ch. D 225.
(3) 9 Ch D. 143.
(4) (1890) 63 L. T. 416.
(5) (1888) 59 L. T. 197.
(6) [1899] 2 Ch. 161, 168.
(7) (1848) 7 Hare, 1.
(8) [1898] 1 Ch. 478.
(9) (1864) 10 H. L. C. 672.
(10) (1877) 2 App. Cas. 215, 239.

C. A. 1905

STUCLEY, *In re.* STUCLEY v. KEKEWICH.

all, as it purports to be, it would seem to be void altogether: *Alexander* v. *Newman.* (1)

George Lawrence, in reply. This is a case in which the assignee of a reversionary interest in a fund is in the position of an express trustee having money in his hands in trust for the assignor, and, therefore, time cannot be pleaded as a bar to the claim of the assignor.

With regard to an unpaid vendor, he is, on principle, in the same position as a mortgagee, and has the same remedies. He is, in respect of his interest, a "secured creditor": *Levy* v. *Stogdon.* (2) Here, time did not begin to run against the plaintiff until the reversion fell into possession by his father's death. Moreover, it cannot be properly contended that, while the plaintiff's interest remained reversionary, he was bound to sue his father in order to prevent his lien being ousted. In fact, until his father's death, he was not aware of his real position: so that laches or delay are out of the question.

Then, as regards interest, it is clear on the authorities that a mortgagee (as this plaintiff really is) of a reversionary interest is not limited to recovering six years' interest, for s. 42 of the Real Property Limitation Act, 1833, does not apply to personal estate at all: *Toft* v. *Stevenson* (3); *Smith* v. *Hill* (4); *Mellersh* v. *Brown* (5); *Clarkson* v. *Henderson.* (6)

Lastly, upon the evidence, it is clear that the 1500*l.* has never been paid, and that the statement in the assignment that the money had been paid was the mere invention of the draftsman.

Cur. adv. vult.

Nov. 8. VAUGHAN WILLIAMS L.J., after shortly stating the facts and reading the claims in the action, proceeded:— Farwell J. gave judgment dismissing the action, holding that the evidence on the trial of the action was not strong enough to override the plain words of the deed of January 31, 1874; but,

(1) (1846) 2 C. B. 122, 135, 137, 144—5.
(2) [1898] 1 Ch. 478.
(3) (1854) 5 D. M. & G. 735.
(4) 9 Ch. D. 143.
(5) 45 Ch. D. 225.
(6) (1880) 14 Ch. D. 348; see also *In re Lloyd,* [1903] 1 Ch. 385.

although dismissing the action, the learned judge does not expressly deal with the claim for a declaration of a lien in favour of the plaintiff as an unpaid vendor. I agree with the findings of fact of the learned judge and with his conclusion in respect of the other claims. It was really not contended that there ever was a payment in cash by Sir George to his son of the 1500*l.*, the receipt of which is acknowledged by the receipt indorsed on the deed. The executors cannot find any trace of this sum ever having been paid either in cash or in account or by agreed appropriation. In fact, Mr. Upjohn admitted that he could not argue that, as cash, that sum had, in accordance with the receipt indorsed, been paid, and Farwell J. in his judgment takes the same view. The question, therefore, arises whether the plaintiff, Edward Stucley, is not, as unpaid vendor, entitled to the declaration of lien he claims on this reversionary legacy assigned by him to his father, and which continued reversionary down to the death of the father. Two points were made by Mr. Vaughan Hawkins as against this claim. One was that the doctrine of the lien of an unpaid vendor does not apply to a sale of personal property. The other was that, although the expression is frequently used that equity gives the unpaid vendor "an interest" in the subject-matter of sale to the extent of the purchase-money owing to him, yet that expression is merely figurative; and that the unpaid vendor here is not entitled to all the remedies which accrue to the owner of an express charge to enforce payment on the reversionary legacy of the sum charged and interest.

With regard to the first point, *Davies* v. *Thomas* (1) is a sufficient authority that the vendor's lien for unpaid purchase-money extends to personal property. That was a case in which the principle of a vendor's lien for unpaid purchase-money was held applicable to the sale of a share of the proceeds of a sale of leaseholds directed by the will of a testator under a trust for conversion. Lord Alverstone there says (2): "But, even if the thing sold had been simply a claim to receive a share of the money arising from the realization of the leaseholds, I think the unpaid

(1) [1900] 2 Ch. 462. (2) [1900] 2 Ch. 468.

C. A. 1905 — STUCLEY, *In re.* STUCLEY *v.* KEKEWICH. — Vaughan Williams L.J

vendor would have been entitled to a lien on the share which he sold." And, although Rigby L.J. stated that there was another way in which the case might be disposed of without going carefully into the question of a vendor's lien, he did not dissent from the view taken by Lord Alverstone. The case is, in my opinion, an express authority that a vendor's lien for unpaid purchase-money extends to personal property. And I wish to add that, having regard to the express decision in that case of *Davies* v. *Thomas* (1), I do not think it is at all necessary to do more than follow that decision of the Court of Appeal; but an examination of the authorities, to my mind, shews that the principle affirmed in that case, namely, that the lien of an unpaid vendor applies to personal property, is by no means a new principle there affirmed for the first time.

As to the second point, in the first place the case of *Rose* v. *Watson* (2) shews that the lien extends not only to principal money, but also to interest from the time that the equitable lien comes into existence; and *Munns* v. *Isle of Wight Ry. Co.* (3) shews that the right which the owner of an express charge possesses to have the charge raised by a sale or mortgage of the property charged extends to a lien arising under general principles of equity, such as a vendor's lien.

Now, in the present case, an unpaid vendor is claiming a declaration of lien for the purpose of enforcing the undoubted interest he possesses to have his unpaid purchase-money paid out of the subject-matter of the assignment in question. It was suggested that, although he might have had a lien which he could have enforced—and enforced by obtaining an order of the Court for a sale or mortgage—yet this right did not extend to payment of interest for the whole period since the date on which the purchase-money ought to have been paid; and an attempt was made to contend that the right to interest can only be enforced with regard to arrears of interest for which an action can be brought without being obnoxious to the Statute of Limitations. In my judgment, the authorities clearly shew that this is not so. Of course, in the case of a sale and purchase

(1) [1900] 2 Ch. 462. (2) 10 H. L. C. 672.
(3) (1870) L. R. 5 Ch. 414.

of land, the express provisions of s. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), apply; but that section has no application to a case of personalty: and, in my opinion, the authorities shew that, in the case of a lien on personal property which is the subject-matter of a sale, not only does that statute not apply, but there is no Statute of Limitations which has any application at all.

The first case in which, in my judgment, that state of the law was recognized is *Smith* v. *Hill* (1), where it was held that a mortgage of a reversionary interest in a sum of money forming part of a testator's residuary personal estate was unaffected by s. 42 of the statute, notwithstanding that such sum was invested on mortgage of real estate.

But the case which, to my mind, comes nearer to the present is *Mellersh* v. *Brown* (2), a decision of Kay J., as he then was. The head-note to that case is this: "A mortgage of reversionary interests in personal estate contained a covenant by the mortgagor for payment of the mortgage money with interest at 5 per cent. on a specified day; but there was no provision for payment of any subsequent interest. No interest was ever paid. Fourteen years after the date of the mortgage an action was brought for foreclosure and the usual decree was made:—*Held*, that redemption could only be allowed on payment of interest at 5 per cent. for the whole period of fourteen years."

Now, if it is true that the unpaid vendor has this equitable lien on the personal property, the subject-matter of the sale, for his unpaid purchase-money, and if it is true—and I have already said that, in my opinion, it is true—that the remedy for enforcing that lien is the same as where there is an express charge, then it follows that in such a case there is no Statute of Limitations which will prevent the vendor from recovering that purchase-money, together with the whole of the interest from the time the purchase-money ought to have been paid.

In my judgment the result is that the plaintiff, Edward Stucley, is entitled to enforce his remedies against the fund representing the reversionary legacy for obtaining the 1500*l.* unpaid purchase-money, together with interest from the date of

(1) 9 Ch. D. 143. (2) 45 Ch. D. 225.

C. A. 1905

STUCLEY, *In re.* STUCLEY v. KEKEWICH.

Vaughan Williams L.J.

the assignment, which I suppose should be at 4 per cent. It is not necessary that we should work out the figures now, but the result is that to a substantial extent the plaintiff has succeeded in this action, though the largest part of the plaintiff's claim is a claim in which he has failed. As to the costs, in the circumstances it seems to me that justice will best be done in this case by directing that there shall be no costs either below or on appeal.

STIRLING L.J. said that, upon the evidence, there was no real ground for the contention that the deed purporting to be an assignment by the son to the father of the reversionary legacy of 5000*l.* ought to be treated as a security only. His Lordship then proceeded:—In the circumstances of this case I have come to the conclusion that the sum of 1500*l.* which was expressed to be the consideration money for the purchase of this reversionary interest, was not paid by the father in any shape whatever, and, therefore, that the plaintiff is, as regards that sum of purchase-money, in the position of an unpaid vendor of that reversionary legacy. The question, therefore, is whether the plaintiff is entitled, as an unpaid vendor, to a lien upon the legacy.

Now, in the case of *Shaw* v. *Foster* (1)—which was a case of sale of leasehold property, but the observations I am about to read apply equally to a case of real estate—the relation subsisting in the eye of a Court of Equity between a vendor and a purchaser is thus stated by Lord Cairns (2): "The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a Court of Equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee; he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." So that the unpaid vendor is there treated as having an

(1) (1872) L. R. 5 H. L. 321. (2) L. R. 5 H. L. 338.

"interest"—"a personal and substantial interest"—in the property he has sold.

Again, in *Rose* v. *Watson* (1), which was the converse case—namely, a case in which the purchaser had paid part of his purchase-money under a contract for sale, and then declined to complete—Lord Cranworth says this (2): "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as owner of the estate. When, instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent." Those last words seem to be very material, regard being had to the argument which has been addressed to us.

Now, here it has occurred (as has occurred frequently before) that a vendor has executed a conveyance upon the face of which it is expressed that he has received the purchase-money, and there is an indorsement on the conveyance of a receipt for the money. It has long since been decided by *Mackreth* v. *Symmons* (3) that, although the conveyance contains a statement upon the face of it that the purchase-money has been paid, and a receipt for the money is indorsed on the deed, yet, if the money has not in fact been paid, the vendor's lien will prevail, not only against the purchaser, but also against all persons claiming under him with notice that the purchase-money has not been paid.

Such, then, is the position defined by the authorities as regards a sale of real estate. In my opinion *Davies* v. *Thomas* (4) is an authority that the doctrine is not limited to the case of a sale of real estate, but extends, at any rate in some cases, to a sale of personal estate, and in my opinion to all cases in which the property sold is of such a nature as that the Court will decree specific

(1) 10 H. L. C. 672.
(2) Ibid. 683.
(3) 15 Ves. 329, 337.
(4) [1900] 2 Ch. 462.

C. A. 1905

STUCLEY, *In re.* STUCLEY *v.* KEKEWICH.

Stirling L.J.

performance of the contract for purchase of it. In my opinion, therefore, the plaintiff here is to be treated as having an interest in him in the nature of property in the subject-matter of this sale, namely, in the 5000*l.* legacy purporting to be assigned by this deed of assignment. If, then, he has an interest in the nature of property he is entitled to enforce that interest unless there is some statute or rule of equity to prevent him. It makes, in my opinion, no difference whether the interest arises from a lien given him by a Court of Equity, or whether it arises from an express charge or from an express assignment by way of mortgage. As Lord Cranworth said in *Rose* v. *Watson* (1), the right or interest acquired under the lien is the same as if a mortgage had been executed for the amount unpaid. So, it appears to me, the plaintiff, the unpaid vendor here, is in the same position as if, immediately after the transaction in which the purchase-money was not paid, the father had executed to the plaintiff a charge upon this equitable reversion for the sum unpaid. That being so, there is no Statute of Limitations which applies to the case of a person coming to recover an interest in personal property, such as the fund here, the reversion in which has now fallen in.

In my opinion Kay J.'s observations in *Re Hancock* (2) apply to the present case. The learned judge there pointed out that in the case before him, which was an assignment of a reversionary interest by way of mortgage, the Statute of Limitations would not apply; and then he proceeds as follows—and this meets a considerable part of the argument that has been addressed to us (3): "But then it is said—or at least this is the only way in which the argument could possibly be put, as it seems to me—the debt to secure which this assignment was made is barred, or rather the right to sue to recover the debt is barred; and that therefore the mortgagor has some right to recover back the share he has assigned. Is that so? For example, let us try it by the most concrete instance one can put. Suppose the assignee of this reversionary interest in personal property had commenced an action against the trustees claiming to have the share handed over to him. Of course, he need not make the

(1) 10 H. L. C. 672. (2) 59 L. T 197.
(3) 59 L. T. 199

assignor a party. He had nothing to do but to prove his assignment, and the trustees would have had no answer whatever; they must have handed it over. Then could the mortgagor have maintained successfully a suit to prevent their handing it over? On what ground? Suppose he had brought an action saying, 'True, I did assign this; true, the reversion fell in so lately as October, 1887; but I seek to restrain the trustees from handing over that reversion to my assignee, because I say that the debt to secure which I made the assignment is barred.' What Statute of Limitations or any other statute would enable him to maintain an action like that? There is no Statute of Limitations which destroys the debt. The Statute of Limitations only destroys the remedy of the creditor. The creditor could not sue the mortgagor upon the covenant, because then he would be met by the Statute of Limitations which bars the action. The mortgagee says, 'I do not want to sue anybody; all I want is to have this mortgage property, which is mine, handed over to me.' How it can be kept from him I cannot conceive."

All that applies, with very slight variations, to the present case. Here the position of the plaintiff's father was this, that he became sole trustee and executor of the will under which the plaintiff claims, and in that capacity he had the fund under his control. He, of course, had notice of the assignment to himself and of the fact that he had failed to pay the purchase-money. That brings the case almost directly within *Davies* v. *Thomas*. (1) In that case Rigby L.J.—after pointing out that the trustees of the will at the time of the mortgage (which was of a reversionary share of the proceeds of leaseholds directed to be sold) held the property upon certain trusts, and that at the time of the sale of the mortgagor's interest the trustees held the property in the condition of leaseholds, and that subsequently to the assignment to the purchaser they sold the leaseholds, and then held the proceeds in trust for the persons entitled—proceeded as follows (2): "What was the position of the trustees? David Lewis, the purchaser, was throughout the solicitor who acted for the trustees as well as the solicitor for the plaintiff, who was the vendor. . . . . It would, in my opinion, be impossible for the trustees to say

(1) [1900] 2 Ch. 462. (2) [1900] 2 Ch. 471.

C. A. 1905

STUCLEY, *In re.* STUCLEY *v.* KEKEWICH.

Stirling L.J.

that they had not in equity constructive notice of the purchase by their solicitor of the mortgaged property, and of the fact that he had not paid the whole of the purchase-money. It was their duty to administer the trust fund produced by the sale of the leasehold property—a fund which was in their hands subject to the trusts of the will. Could they in favour of their solicitor ignore the rights of the vendor and say that they were not concerned with him, but were concerned only with their own solicitor who had purchased the mortgaged share from him? If a Court of Equity had been administering the fund, it would have inquired into the facts, and, finding that the purchaser had not paid the purchase-money, it would have held that it was its first duty to see that the mortgagee, and through him the mortgagor, had been satisfied before handing over the purchased share to the purchaser. The Court would have had no difficulty in doing that. And, in my opinion, the trustees are bound to do that which the Court would have done had it been administering the fund."

So here, the fund was under the legal control of the father in his capacity of trustee and executor. If the Court had been administering the fund and had found that the trustee of this fund had, on purchasing the reversionary interest in it, failed to pay his purchase-money, the Court would have had no difficulty in enforcing the right of the unpaid vendor.

I am, therefore, of opinion that the plaintiff has a lien for the unpaid sum of 1500*l.* entitling him to payment of that sum, together with interest at 4 per cent. from the date of the purchase. This is in accordance with *Smith* v. *Hill* (1) and *Mellersh* v. *Brown*. (2)

It appears that the legacy in question formed a moiety of a sum of 10,000*l.* originally secured by a Mersey bond. According to the evidence of the solicitor to the defendants that bond has been sold, and the money has been invested on other security. The fund having been under the control of Sir George Stucley, not only the bond itself, but also the security substituted for it, became liable to the plaintiff's lien. As to the defendants'

(1) 9 Ch. D. 143. (2) 45 Ch. D. 225.

contention that the plaintiff's claim is too late, in my opinion, having regard to the circumstances of the case, the plaintiff's demand is not a stale one, and he is not on that ground deprived of the right he now seeks to enforce. It appears to me, therefore, that on this part of the case the plaintiff succeeds.

COZENS-HARDY L.J. I am of the same opinion, and have very little to add. I agree entirely with all that Farwell J. said upon that part of the case to which his decision was directed.

With regard to the point as to the right of the vendor to a lien for his unpaid purchase-money, but for the elaborate argument we have heard upon that part of the case, I should have thought it was scarcely arguable. To my mind it is impossible to doubt that this assignment must be treated as it purports to be, that is, as an assignment by way of absolute sale. I cannot rely upon parol evidence of a transaction which happened thirty years ago: I think one is bound to take all the documents relating to that transaction as they stand, and one of those documents is an assignment upon the purchase by the father from the son of the latter's reversionary legacy of 5000*l.* in consideration of the sum of 1500*l.*; and the part of that transaction which it is now important to consider is that the 1500*l.* purchase-money was never paid by the father to the son. That being so, it is said that the vendor has, according to well-settled principles, a lien upon the property which he sold for the purchase-money which has never been paid. Now, it is quite settled that a vendor's lien is not a mere personal equity, and that it really creates a charge upon and an interest in the property sold, in the same manner as if that charge had been created by writing. One cannot illustrate that better than by reference to the old law. Under that law the purchase-money for land contracted to be sold by a testator, but in respect of which he had the usual vendor's lien at his death, was not available for satisfying charitable legacies; and for this reason, because that lien was an "interest in land," for a vendor's lien on the sale of land is recoverable by statute as being an incumbrance on the land.

But it has been argued that a vendor's lien is limited to land, and does not extend to personal estate. Now, there is the

C. A. 1905

STUCLEY, *In re.* STUCLEY *v.* KEKEWICH.

Cozens-Hardy L.J.

distinct authority of the Court of Appeal in *Davies* v. *Thomas* (1) to the contrary; and, that being so, I do not think it necessary to go back to the earlier authorities, or to discuss the principles upon which those authorities were decided. I see no reason in principle why the doctrine should not apply to every case of personal property in which the Court of Equity assumes jurisdiction over the subject-matter of the sale. Then, if there is in the present case the right to a vendor's lien—as I am of opinion there is—over this personal estate which was sold, there is no Statute of Limitations which applies; and there is no answer to the claim for interest from the date at which the right to interest arose, that is, from the date of the deed.

Again, the purchaser, Sir George Stucley, was in the position of sole trustee of the fund the reversionary interest in which was the subject-matter of the sale and purchase. He was also entitled to the income of the fund during his life, and by reason of his purchase he became entitled to the reversion in that fund, but subject to the vendor's lien. His representatives cannot, merely because the fund is now in possession and no longer reversionary, say that that lien is thereby destroyed. In my opinion that lien is imposed upon the fund which was in the father's hands, and is now in the hands of his representatives. Accordingly, there must be an order for payment to the plaintiff of the 1500*l.* out of the fund, together with interest at 4 per cent. from the date of the purchase; with liberty to apply.

Solicitors: *Witham, Roskell, Munster & Weld; Moon, Gilks & Moon.*

(1) [1900] 2 Ch. 462.

G. I. F. C.

In re ALSOP'S PATENT.

C. A. 1905 Nov. 25, 28; Dec. 16.

Patent—Amendment of Specification—Disclaimer—Pending Litigation—Liberty to Apply for Leave to Disclaim—Form of Order—Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), s. 19.

Upon an application by a patentee to the Court under s. 19 of the Patents, Designs and Trade Marks Act, 1883, for liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, the Court is not concerned with the terms of the proposed amendment except for the purpose of guiding it in the exercise of its discretion under the section.

Consequently the Court will not refuse an application under this section upon the ground that the proposed amendment is not an amendment by way of disclaimer as distinguished from correction or explanation unless it is satisfied that this is so by a mere perusal of the specification.

THIS was an appeal by the Alsop Flour Process, Limited, who were the registered proprietors of Letters Patent No. 14006 of 1903, from the refusal of Buckley J. to grant them liberty under s. 19 of the Patents, Designs and Trade Marks Act, 1883, to apply at the Patent Office for leave to amend their specification by way of disclaimer.

The patent was granted to J. N. Alsop for "An Improved Process of Treating Flour to Purify the same and Increase the Nutritive Qualities thereof."

The nature of the invention was thus described by the patentee in his complete specification: "This invention relates to a novel process of treating flour to purify the same and increase the nutritive qualities thereof, and to this end resides broadly in subjecting flour to the action of a gaseous medium which will operate to bleach or purify the flour and cause a reduction of the quantity of the carbohydrate contents, and an increase in the quantity of the protein contents thereof. The gaseous medium which I employ is atmospheric air which has been subjected to the action of an arc, or flaming discharge, of electricity. The resultant gas I have discovered first by laboratory experimentation, and then by actual practice on a commercial scale, to possess the property of causing a material

C. A. 1905

ALSOP'S PATENT, *In re*.

decrease in the percentage of the ash and starch of the flour subjected to its action, and a practically corresponding increase in the proteids, thus greatly increasing the nutritive, in contra-distinction to the heat-giving qualities of the flour." Then, after a reference to the bleaching properties of the invention, the specification proceeded to state the result of a chemical analysis of certain samples of flour before and after its treatment by this process, shewing that the effect of the treatment was to increase the proportion of proteids in the flour; and it also contained some other passages relating to this question.

After describing the invention in detail the patentee claimed "1. The process of treating flour which consists in subjecting the same to the action of air which has previously been subjected to the action of an arc or flame of electricity, substantially as described. 2. The process which consists in reducing the quantity of carbohydrate contents of flour and increasing the protein contents thereof by subjecting the flour to the action of the body or bodies produced by the flaming electric discharge in air." The patentee added four other claims, of which claims 3 and 4 were in substance repetitions of claim 1, and claims 5 and 6 were in substance repetitions of claim 2, in different language.

The Flour Oxidizing Company, Limited, who were the owners of a rival patent, presented a petition for the revocation of Alsop's patent upon the ground (among other grounds) that the patent was obtained by the false suggestion of the patentee that his process produced an increase of the proteids in the flour subjected to it. When the petition came on for hearing, and before the petitioners had opened their case, the Alsop Flour Process, Limited, applied to the Court under s. 19 of the Patents, Designs and Trade Marks Act, 1883 (1), for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer. They sought by their proposed amendments to strike out from

(1) Sect. 19 enacts that "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

the specification all references to the increase in the quantity of proteids and in the nutritive qualities of the flour alleged to be produced by the patented process. This involved striking out the latter half of the title of the invention, several passages in the body of the specification, and claims 2, 5 and 6. The application was opposed by the petitioners.

Buckley J. was of opinion that the claim of the patentee was simply for a process and that the effect of the proposed amendments was merely to say that that process would not produce a result which the patentee had said it would produce. That in his Lordship's opinion did not reduce the ambit of the claim, and he therefore thought that this amendment was not disclaimer within s. 19 of the Patents, Designs, and Trade Marks Act, 1883, but was correction, and he refused the application.

The Alsop Flour Process, Limited, appealed.

Haldane, K.C., and *Bousfield, K.C.* (*J. C. Graham* with them), for the Alsop Flour Process, Limited.

The question is, what is the proper course to be adopted by a patentee who desires to amend his specification by disclaimer under s. 19 of the Patents, Designs and Trade Marks Act, 1883?

That section shews that the proper course is not to apply to the Court to allow the disclaimer, but merely to ask the Court for liberty to apply to the Comptroller for leave to disclaim, and the Court has power, in granting such liberty to apply, to impose terms. The discretionary power given to the Court by the section does not extend beyond that, the power to allow or refuse disclaimer being vested in the Comptroller alone. That view is supported by the authorities: *In re Dellwick's Patent* (1); *In re Chatwood's Patent.* (2)

[COZENS-HARDY L.J. referred to *In re Geipel's Patent* (3) and *In re Armstrong's Patent.* (4)]

We admit that the section must be read strictly and does not include correction or explanation, except for the purposes of defining the disclaimer: *In re Owen's Patent.* (5) In that case

(1) [1896] 2 Ch. 705; 13 Rep. Pat. Cas. 591.
(2) (1899) 16 Rep. Pat. Cas. 370.
(3) (1904) 21 Rep. Pat. Cas. 379.
(4) (1897) 14 Rep. Pat. Cas. 747.
(5) (1898) 15 Rep. Pat. Cas. 755.

C. A. 1905 — ALSOP'S PATENT, *In re*.

the application was refused because the proposed amendment was on the face of it only correction. That is not really antagonistic to the view that it is not the duty of the Court to enter into a detailed criticism of the proposed disclaimer. Again, in *In re Armstrong's Patent* (1), the application was refused where the Court saw that the patent, even if amended, would still be anticipated. Those are the only two cases in which the application has been refused. *In re Dellwick's Patent* (2) shews that the Court, if satisfied that the application is not a trumpery case, will not discuss the merits of the amendment, but will leave that question to the Comptroller, and that is consistent with all the authorities. And if the disclaimer is allowed by the Comptroller, or on appeal by the Law Officer, it cannot be afterwards challenged by the Court: *Moser* v. *Marsden*. (3)

[VAUGHAN WILLIAMS L.J. referred to *Ralston* v. *Smith* (4) as to the meaning of disclaimer.]

Applying those principles to the present case, prima facie this is a proper case for the exercise by the Court of its discretion. The object of a disclaimer is usually to get rid of a false suggestion and in that sense it is correction, but it may still be disclaimer. There is no ground for adopting the highly technical meaning given to disclaimer by Buckley J.

Moulton, K.C., and *A. J. Walter* (*Astbury, K.C.*, with them), for the Flour Oxidizing Company. It is admitted that disclaimer in s. 19 is used in contradistinction to correction and explanation in s. 18, and must be construed strictly because the rights of other parties have intervened. Upon an application under this section the Court must first decide whether the application is within its jurisdiction, and in order to decide that it must ascertain whether the proposed amendment is disclaimer pure and simple; then if the Court decides that the application is within its jurisdiction, it has a discretion to say whether the leave ought to be granted and upon what terms. Those two issues are quite distinct. The intention of the Legislature was that where there were blots upon the specification which could only be

(1) 14 Rep. Pat. Cas. 747.
(2) [1896] 2 Ch. 705; 13 Rep. Pat. Cas. 591.
(3) (1895) 13 Rep. Pat. Cas. 24.
(4) (1865) 11 H. L. C. 223, 243.

cured by correction or explanation the parties should go to trial with those blots upon the specification. But s. 19 applies only during the pendency of the litigation, and therefore if after the trial the Court comes to the conclusion that the patent would still be good if amendment by way of correction or explanation were allowed, it is competent for the Court instead of making an absolute order for revocation to order the patent to be revoked unless the patentee applies within a given time to the comptroller for amendment under s. 18. We say first that this is not disclaimer at all. Disclaiming means lessening the claim of the patent. There is no disclaimer here, because everything which was an infringement of the original would be an infringement of the amended patent. The whole of the patent is included in claim 1. The patentee claims the process and states that it produces certain results. He now wishes to say that one of those results does not follow. That is not disclaimer, but correction. Under pretence of disclaimer it is in substance merely the correction of an untenable statement. The test is whether the ambit of the monopoly is diminished. Secondly, assuming that the Court has jurisdiction it ought in the exercise of its discretion to refuse the application, inasmuch as the main reason for granting the patent was the false statement as to the effect of the invention in increasing the nutritive qualities of the flour.

Bousfield, K.C., in reply. The Court will only look at the proposed amendment for the purpose of assisting it in the exercise of its discretion. If a patentee claims that his process will do something which it will not do, and then disavows that, that is disclaimer within the definition of disclaimer given by Lord Westbury in *Ralston* v. *Smith*. (1) It is a lopping off of the vicious matter in the specification without the necessity of addition.

Cur. adv. vult.

Dec. 16. COZENS-HARDY L.J. delivered the first judgment. He said:—This is an appeal from Buckley J., who in a proceeding for revocation of a patent has declined to give liberty to

(1) 11 H. L. C. 243.

C. A. 1905

ALSOP'S PATENT, *In re.*

Cozens-Hardy L.J.

the patentee to apply at the Patent Office for leave to amend his specification by way of disclaimer. The application was made under s. 19 of the Patents Act, 1883. It has been held that the power given by that section is limited to amendment by way of disclaimer as distinct from correction or alteration. Now, it is plain that the Court, which cannot itself amend a patent, has a discretion in the matter, and in order to guide the Court in the exercise of this discretion it is convenient, and indeed necessary, that the Court should be informed generally as to the nature of the amendment desired. If the Court sees clearly that what is proposed is not an amendment by way of disclaimer, the Court ought not to give leave. If the application is made at a stage in the proceedings when the Court has heard evidence and is in a position fully to appreciate the nature of the invention, the Court may reasonably refuse leave if satisfied that the desired amendment by way of disclaimer can produce no good result to the patentee. It was argued that the Court has no jurisdiction to grant the application unless it is satisfied affirmatively that what is desired will be amendment by way of disclaimer. I feel no doubt of our jurisdiction to give leave in the precise language of s. 19. In my opinion it is not desirable where the Court feels uncertain whether the proposed amendment is by way of disclaimer to refuse to send it to the proper tribunal appointed by statute to decide that question. This was the view of Byrne J. in *In re Chatwood's Patent.* (1) In the present case there are six claims in the patent, and the patentee says he wishes to strike out three of those claims, and also to strike out certain passages in the body of the patent relating to the claims so struck out. Prima facie this will be an amendment by way of disclaimer. It is, however, contended that the patent is really for one single process, and that the disclaimer will leave the process just where it was before without in any way reducing the ambit of his claim, and that the patentee wants only to say that one of the two results which he asserted that his process would produce cannot in truth be produced. Buckley J. has adopted this view, and has in effect held that what is desired is amendment by correction or explanation and not by way of disclaimer. I am not satisfied by the mere

(1) 16 Rep. Pat. Cas. 370.

reading of the specification that this is so. And I think the patentee ought to be allowed to apply to the proper tribunal—that is, the Patent Office—where there will be the opportunity of securing such explanation of the process and of the language used as may be necessary to enable the tribunal to decide whether amendment by way of disclaimer only ought to be allowed. This being so, I think it better not to indicate any view of my own. The application will be dealt with on its merits and without any intimation from this Court as to the course the Comptroller ought to take. It will be necessary for us to hear arguments upon the terms as to costs and otherwise which ought to be imposed upon the patentee as a condition of this liberty.

STIRLING L.J. I entirely agree. I think that upon an application to the Court under s. 19 of the Patents, Designs and Trade Marks Act, 1883, for liberty to apply at the Patent Office for leave to amend a specification by way of disclaimer the Court has no concern with the terms of the proposed disclaimer except for the purpose of guiding it in the exercise of the discretion conferred by the section as to whether liberty shall or shall not be given; for the decision whether a disclaimer shall be allowed or not rests with the Patent Office, and not with the Court.

I understand that this was the view taken by Kekewich J. and the Court of Appeal in *In re Armstrong's Patent* (1), and Byrne J. in *In re Chatwood's Patent* (2), and I did not intend to take any other view in the case of *In re Owen's Patent* (3), to which I still adhere.

I should like also to point out that disclaimer is, according to the definition given by Lord Chelmsford in *Ralston* v. *Smith* (4), "the renunciation of some previous claim actually or apparently made, or supposed to be made." In the present case the patentee proposes to disclaim three out of six heads of claim contained in the specification, and the proposed disclaimer prima facie falls within the definition. But whether this be so or not, and I am not expressing any concluded opinion upon it, I am unable, from mere perusal of the specification, to satisfy myself

(1) 14 Rep. Pat. Cas. 747.
(2) 16 Rep. Pat. Cas. 370.
(3) 15 Rep. Pat. Cas. 755.
(4) 11 H. L. C. 254.

C. A. 1905

ALSOP'S PATENT, *In re.*

that the proposed amendment is not one by way of disclaimer within the meaning of the statute. And in these circumstances I think the patentee ought to be allowed to submit the question to the statutory tribunal by which such questions are to be decided.

VAUGHAN WILLIAMS L.J. I entirely agree.

After some argument as to the terms upon which the application should be allowed the following order was ultimately made, the word "respondents" being used in the order in the sense of respondents to the petition :—

Appeal allowed. The respondents' costs of appeal to be theirs in any event and to be set off. Order that the respondents be at liberty to apply at the Patent Office for leave to amend by way of disclaimer, such application to be made within one week of the beginning of next sittings. The petitioners' costs of the petition and of their particulars of objection, including the costs of this application before Buckley J. save so far as the same can be utilized for the purpose of the petition after amendment, to be theirs in any event. Liberty to the petitioners after the disclaimer to amend the petition and particulars of objections as they may be advised. The respondents not to threaten any persons with legal proceedings on the patent pending amendment. The petition to stand over until after amendment. Liberty to apply to restore if amendment proceedings are not prosecuted with due diligence. If the petitioners elect not to proceed with the petition after amendment respondents to pay the whole of the costs of the petition and particulars of objections incurred up to this date.

Solicitors : *Hollams, Sons, Coward & Hawksley ; Wilson, Bristows & Carpmael.*

H. B. H.

In re ODDY.
MAJOR *v.* HARNESS.

[1904 O. 817.]

C. A.
1905
BUCKLEY J.
Nov. 10.
C. A.
Dec. 20.

Practice—Process—Attachment—Breach of Trust—Misapplication of Trust Funds—Form of Judgment—Judgment for Recovery of Money—Four-day Order—Rules of Supreme Court, 1883, *Order* XLI., *r.* 5; *Order* XLII., *r.* 3.

A judgment that the plaintiff do recover from the defendant a sum of money cannot be supplemented by an order fixing a time for the payment of the money by the defendant.

Therefore where the plaintiff in an action against a trustee for a misapplication of trust funds obtained judgment against him for recovery by the plaintiff from the defendant of a sum of money representing the loss to the trust estate instead of judgment in the usual form for payment of the money to the plaintiff by the defendant:—

Held, reversing the decision of Buckley J., that the judgment could not be supplemented by a four-day order so as to found a right to issue a writ of attachment against the defendant in default of payment within the stipulated time.

By the judgment in this action, which was tried before Buckley J. on August 5, 1905, the Court declared that the defendant Harness had committed a breach of trust in the sale and application of the sum of 1200*l.* 4 per cent. debenture stock in the Midland Railway Company, referred to in the statement of claim, and it was ordered that the plaintiff do recover from the said defendant the sum of 1248*l.* 11*s.*, being the loss occasioned to the trust estate after deducting certain payments already made by the defendant Harness, and that the said defendant do pay to the plaintiff his costs of the action.

By an order dated November 6, 1905, made by Buckley J. in chambers upon the application of the plaintiff, it was ordered that the defendant Harness do within four days after service pay to the plaintiff the sum of 1501*l.* 1*s.*, being the amount of the judgment with interest and costs.

The defendant Harness now moved to discharge this order.

C. A. 1905 — ODDY, *In re.* MAJOR *v.* HARNESS.

Luxmoore, for the defendant Harness. *Hulbert and Crowe* v. *Cathcart* (1) decides that the making of a four-day order is not a mode of enforcing the original order within r. 3 of Order XLII. (2), but is only a means of supplementing it, and that an order that the plaintiff do recover a sum of money cannot be supplemented by an order fixing the time for payment.

[He also referred to r. 5 of Order XLI. (3) and the notes thereon in the Annual Practice, pp. 532—534.]

Cannot, for the plaintiff.

BUCKLEY J. On November 6 I made an order at chambers, on the application of the plaintiff, that the defendant Harness should within four days after service pay to the plaintiff the sum of 1501*l.* 1*s.*, the subject of a judgment of August 5. This is a motion to discharge that order. I understood that the parties were desirous of appealing, and I therefore adjourned the matter into Court that I might have the advantage of hearing further argument, and that I might state my reasons for the information of the Court of Appeal. The judgment of August 5 contained a declaration that Harness had committed a breach of trust, and an order that the plaintiff should recover from him the sum of 1248*l.* 11*s.*, being the loss occasioned to the trust estate after deducting certain sums already paid by the defendant. Why the plaintiff drew up the judgment in that form I do not know, but there it is. It is not

(1) [1894] 1 Q. B. 244.

(2) Order XLII., r. 3, provides as follows: "A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof"

(3) Order XLI., r. 5, provides as follows: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz.:—'If you, the within named A.B., neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order].'"

an order for payment, but for recovery of a sum of money. The plaintiff is desirous of enforcing that order by obtaining an order limiting a time for payment in the way that would have been appropriate if the judgment had been for payment. [His Lordship read r. 3 of Order XLII., and continued:—] There can be no question that according to the practice of this Court a judgment for payment of money which fixes no time can be followed by an order which does fix a time. It seems to me, that the case before me is covered by the words of the rule. There is a judgment for the recovery of money, and I am asked to enforce it by means which would have been appropriate if it had been a judgment for payment of money. But I am referred to *Hulbert and Crowe* v. *Cathcart* (1), from which it is argued that I ought to hold myself bound by authority to say that the language of the rule does not enable me to make such an order. I do not feel myself bound to come to that conclusion. *Hulbert and Crowe* v. *Cathcart* (1) was a case in which the plaintiffs had recovered judgment against the defendant for a sum of money, and the master made an order—not what we call a four-day order, but an order that the defendant should pay the amount, recovered by the plaintiffs against her in the action, within ten days from the service of the order, and in default of such payment that the plaintiffs should be at liberty to issue a writ of sequestration against the defendant's separate property. That is, of course, not a four-day order, but a much more extensive order. The learned judge calls attention to that fact, for he says (2): "There is yet another objection to this order, namely, that it is quite contrary to principle to make an order in the nature of an order in contempt, as a writ of sequestration is, when the person against whom it is made is not in contempt. This order is an order as upon a contempt if a hypothetical case shall become a real one, which is quite contrary to the decision in *Stonor* v. *Fowle*." (3) That is a sufficient reason to support the decision of the Court in *Hulbert and Crowe* v. *Cathcart* (1), and although I find in the earlier part of the judgment language which is rather difficult to understand, I do not think the decision

(1) [1894] 1 Q. B. 244.
(2) Ibid. 246.
(3) (1886) 18 Q. B. D. 213; (1887) 13 App. Cas. 20.

C. A. 1905

ODDY, *In re.* MAJOR *v.* HARNESS.

governs the present case. In my opinion the order I made was right, and the motion must be dismissed.

Leave to appeal was granted. H. C. R.

The defendant Harness appealed. The appeal was heard on December 20, 1905.

Cave, K.C., and *Luxmoore*, for the defendant Harness. A judgment that the plaintiff do recover from the defendant a certain sum of money cannot be supplemented by a four-day order, and cannot be enforced by attachment. The effect of that order is to convert a judgment for recovery of money by the plaintiff into a judgment for payment of the money by the defendant within a fixed time.

By Order XLI., r. 5, every judgment requiring a person to do an act must fix a time within which the act is to be done, but if the judgment omits to fix the time, the time may be fixed by a supplemental order; but the judgment in this case does not require the defendant to do anything, and therefore it cannot fix a time, and cannot be supplemented by an order fixing the time: *Drewett* v. *Edwards* (1); *Hulbert and Crowe* v. *Cathcart*. (2) Buckley J. thought that this case fell within Order XLII., r. 3, but making a supplemental order is not a mode of enforcing the original order within that rule. The various modes of enforcing an order are set out in the Annual Practice at p. 536, and the making of a supplemental order is not included in the list. We therefore say that the four-day order was made without jurisdiction.

Cannot, for the plaintiff. *Drewett* v. *Edwards* (1) and *Hulbert and Crowe* v. *Cathcart* (2) are distinguishable, because these were common law cases, and there was not in either of those cases, as there is here, a declaration that a breach of trust has been committed. Decrees and orders for payment or recovery of a sum of money were formerly enforced by attachment, but, with certain exceptions, that remedy was taken away by the Debtors Act, 1869, s. 4. This case falls within the third exception in that section: see Annual Practice, p. 537. Therefore I

(1) (1877) 37 L. T. 622; 26 W. R. 122. (2) [1894] 1 Q. B. 244.

say that as against a trustee an order for recovery of a sum of money made by the Court of Chancery before the passing of the Judicature Act, 1873, might have been enforced by attachment.

[COZENS-HARDY L.J. The Annual Practice must not be cited as an authority for the proposition that the old Court of Chancery ever made an order for recovery of a sum of money, or ever enforced that order by attachment.]

If this judgment is not enforceable by attachment the declaration was superfluous. Having regard to the declaration, it is immaterial whether the judgment is that the plaintiff do recover or that the defendant do pay. It is said that making a supplemental order is not enforcing it, but it is perfecting the order, and in that sense it is enforcing it. Although the form of judgment in this case is unusual, it falls within the words of Order XLII., r. 3.

VAUGHAN WILLIAMS L.J. I think that this appeal must be allowed. So far as the practice is concerned, the case of *Drewett* v. *Edwards* (1), which was a decision of the Court of Appeal, is an authority. I am quite aware that that case was decided before r. 3 of Order XLII. was made, but still that case shews as plainly as possible that according to the practice at common law an order that the plaintiff do recover a sum of money could not be supplemented by a four-day order; and the Court of Chancery did not use that form of order at all. That case was followed up by *Hulbert and Crowe* v. *Cathcart* (2), which was decided by Wills and Wright JJ.; and they, though they dealt there with the question of sequestration, did lay down in the most emphatic manner that an order that the plaintiff do recove a sum of money, could not be followed by a four-day order. Buckley J. says that he does not quite understand the earlier part of the judgment of Wills J. I think he can only mean that he does not understand why Wills J. decided as he did, because the words of the judgment are very plain indeed. The only thing we have to deal with here is the language of r. 3 of Order XLII. [His Lordship read the rule.] Buckley J. says that this case comes within the very words of that rule. I do

(1) 37 L. T. 622; 26 W. R. 122.
(2) [1894] 1 Q. B. 244.

C. A. 1905 — ODDY, *In re.* MAJOR *v.* HARNESS. — Vaughan Williams L.J.

not agree with him there. In the first place I agree with the argument that was put forward by counsel for the appellant, that to make this four-day order is not to enforce the original order. In my judgment, it is to add a new order to the original order. And further, it would not be true to say that the four-day order, so far as it fixes a time, is an order which in the ordinary course ought to have been added to the order that the plaintiff do recover. Not only have I never known such a thing done, but it would very often defeat the very object of drawing up the order in that form. Plaintiffs are sometimes very anxious to get an order in that form, because it enables them to get immediate execution. There is a manifest difference between an order for payment by a trustee and an order that the plaintiff do recover, in considering the question what may be done to complete or supplement the order. In this particular case we do not exactly know what led the plaintiff to take the order in this form, but we know that he did so. We also know that if the plaintiff had not brought the order to the registrar in that form, the registrar would never have made it in that form. I think that this appeal must be allowed with costs.

STIRLING L.J. I am of the same opinion. The judgment which was given in this case, after a declaration that the defendant Harness had committed a breach of trust, proceeded to order that the plaintiff do recover from the defendant a certain sum of money, being the amount of the loss occasioned to the trust estate. That judgment having been given on August 5, 1905, on November 6 an application was made, to which the learned judge acceded, that that order be supplemented by making an order that the defendant Harness do pay to the plaintiff within four days of service of the order then made the sum of 1501*l.* 1*s.*

That order is now appealed from, and the question is whether the learned judge had power to make such an order. The judgment is one by which it is ordered that the plaintiff do recover a certain sum of money. Now, r. 3 of Order XLII. provides as follows: [His Lordship read the rule.] A judgment for the recovery by the plaintiff from the defendant of a certain sum of money was a form of order which prior to the Judicature Act, 1873.

was not adopted by the Court of Chancery. It was a form of order which prior to the Judicature Act was peculiar and appropriate to the Courts of common law, and therefore, in order to ascertain how such an order could be enforced, we have to consider how such an order would have been enforced in the common law Courts prior to the passing of the Judicature Act. Could that order have been enforced in the common law Courts by means of what is practically a supplemental order directing payment of the money within a limited time? We have been referred to two authorities which shew that that could not be done. *Drewett* v. *Edwards* (1) was a decision of the Court of Appeal subsequent to the Judicature Act and is binding on us, and *Hulbert and Crowe* v. *Cathcart* (2) is a more recent case decided by the Divisional Court. Therefore it appears to me to be abundantly clear that a judgment for recovery of a sum of money could not be supplemented by an order for payment within a limited time. From that point of view the order of the learned judge cannot be justified. But reference was made to Order XLI., r. 5. [His Lordship read the rule.] Now, it is said that the Court has jurisdiction under that rule to make such a supplemental order as we have here. I think not. I agree with the argument urged on behalf of the appellant that making such a supplemental order is not enforcing an order already made. It is making an additional and another order, which appears to me to be contrary to the practice of the Court in such a case as this. As regards the suggestion that the declaration in the first part of the judgment that the defendant was a trustee, distinguishes this case from the two cases cited, it appears to me that deduction cannot affect the construction of the order in the latter part of the judgment. If it is desired to pursue the remedies which under the Debtors Act, 1869, are still available against trustees who are ordered to pay money in their possession or under their control, the parties must be careful to select that form of order which was formerly adopted in the old Court of Chancery.

COZENS-HARDY L.J. I agree. There never was a time when in any Court a judgment for the recovery of a sum of money in

(1) 37 L. T. 622. (2) [1894] 1 Q. B. 244.

C. A. 1905 — — ODDY, *In re.* MAJOR *v.* HARNESS. — Cozens-Hardy L.J. —

those words could have been enforced by a four-day order. In the language of Brett L.J. in *Drewett* v. *Edwards* (1), the four-day order was made in equity to supply a deficiency in the decree, which might have contained what was given in the four-day order. The judgment obtained here is not a judgment which ever could name a day, and so there is no deficiency to supply. That was really the principle upon which Wills J. proceeded in *Hulbert and Crowe* v. *Cathcart.* (2) He says: "The judgment is not an order to pay money; and for a master to order that the unsuccessful party shall pay the sum recovered within a certain time is totally to alter the nature of the remedy." For the reasons given by my Lord and Stirling L.J. I think that this appeal must be allowed, and I only regret that Buckley J. had not his attention called to the case of *Drewett* v. *Edwards* (1), which in principle is binding on us, although it is quite true that r. 3 of Order XLII. was not then in force.

Solicitors: *Slark, Edwards & Co.; H. Dade & Co.*

(1) 37 L. T. 622. (3) [1894] 1 Q. B. 246.

H. B. H.

MACMILLAN & CO. *v.* DENT.

KEKEWICH J.

[1904 M. 1165.]

1905

Dec. 4, 5.

Copyright—Book—Posthumous Letter—Proprietorship of Copyright—Sender and Recipient—Right to Prevent Publication—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 3.

Although at common law the writer of a letter and his legal personal representatives are entitled to prevent its publication, and this is a right of property, in the case of a letter published after the death of the writer the copyright is vested by the Copyright Act, 1842, in the proprietor of the letter itself, *i.e.*, of the paper and the writing upon it.

The plaintiffs in this action were the two well-known firms of publishers, Macmillan & Co. and Smith, Elder & Co. The defendant was also a publisher trading as J. M. Dent & Co. The question raised by the action was as to the proprietorship of the copyright in certain letters written by Charles Lamb to his friend Robert Lloyd between the years 1798 and 1810.

In 1895 these letters, sixteen in number, were in the possession of Mr. and Mrs. F. H. Steeds, and they had not then been published. On March 5, 1895, Mr. and Mrs. Steeds sold to Smith, Elder & Co. all the "copyright" which they possessed in these letters (and in certain other letters and manuscripts of the Lloyd family) for 250*l.*, and lent them the actual letters to be copied for the purposes of publication; and these letters were returned to Mr. and Mrs. Steeds in due course.

In 1898 Smith, Elder & Co. published a book entitled "Charles Lamb and the Lloyds," which contained these letters. In May, 1899, Smith, Elder & Co., in consideration of twenty-five guineas, granted to Macmillan & Co. permission to publish these letters in an edition of Lamb's letters to be edited by the late Canon Ainger, and undertook not to give a similar permission to any other firm.

At the end of 1899 Macmillan & Co. published Canon Ainger's edition of Lamb's letters, and this edition contained the letters in question.

In November, 1902, the defendant being desirous of bringing

KEKEWICH J.
1905
MACMILLAN & Co. v. DENT.

out an edition of Lamb's letters, applied to Smith, Elder & Co. for permission to include these letters in his edition, but permission was refused.

In the early part of 1903 the defendant discovered from one of his travellers that some original letters of Charles Lamb were in the market, and upon inquiry it turned out that these letters were the letters now in question.

On May 9, 1903, the defendant purchased from Steeds these letters (together with certain other letters) for 250*l*. Steeds had previously informed the defendant of his assignment of the copyright in the letters in question to Smith, Elder & Co., and the receipt which he gave to the defendant for the 250*l*. was expressed to be for the letters and also for any rights which he might still have therein.

Towards the close of the year the defendant brought out his edition of Lamb's letters, including the letters in question, which he copied from the original manuscripts in his possession.

On January 20, 1904, Smith, Elder & Co. registered themselves as the proprietors of the copyright in these letters, and on April 30, 1904, the writ in this action was issued.

The plaintiffs claimed (1.) an injunction to restrain the defendant from publishing, selling, or offering for sale, any book which infringed the plaintiffs' rights in the letters in question; (2.) an account of profits; and (3.) delivery up of any letterpress in the possession of the defendant containing the said letters.

The defendant by his defence denied that the plaintiffs Smith, Elder & Co. were the proprietors of the copyright, and set up a title acquired by him since the commencement of the action from Charles Lamb's legal personal representative. Charles Lamb made his will on October 9, 1830, and thereby appointed T. N. Talfourd and C. Ryle his executors, and after certain provisions in favour of his sister Mary Lamb (as to the exact meaning of which there might be a question upon the construction of the will) and in default of appointment by her, he gave the residue of his estate to Emma Isola, afterwards Mrs. Edward Moxon. Ryle survived Talfourd, and died intestate. Mary Lamb died without having exercised her power of appointment under the will, and thereupon Mrs. Edward Moxon became entitled to

the residue. She died intestate in February, 1891, and it was stated that her son, A. H. Moxon, was the administrator of her estate; but this fact was not proved. On January 31, 1905, A. H. Moxon took out letters of administration cum testamento annexo de bonis non to the estate of Charles Lamb, and on February 7, 1905, he assigned all his rights in the letters in question to the defendant.

Scrutton, K.C., and *R. A. Wright*, for the plaintiffs. The question of the proprietorship of the copyright in these letters turns upon the construction of s. 3 of the Copyright Act, 1842. (1) That statute made an alteration in the law of copyright. Under 54 Geo. 3, c. 156, whether a work was published during the lifetime of the author or after his death, the copyright was vested in the author and his assigns for a certain period. By the Act of 1842 the time is different, and the proprietorship of the copyright is different. That Act distinguishes between books published in the author's lifetime and books published after his death, and provides that in the former case the copyright shall be the property of the author and his assigns, but that in the latter case the copyright shall be the property of the proprietor of the author's manuscript and his assigns. The distinction between the author and the first publisher runs through nearly all the English copyright legislation. It appears in s. 16 of this same Act, and it appears again in s. 11 of the International Copyright Act, 1886, where the expression "author" in the case of a posthumous work is defined as meaning "the proprietor of the manuscript of such work and any person claiming

(1) Sect. 3 of the Copyright Act, 1842, enacts as follows: "The Copyright in every Book which shall after the passing of this Act be published in the Lifetime of its Author shall endure for the natural Life of such Author, and for the further Term of Seven Years, commencing at the Time of his Death, and shall be the Property of such Author and his Assigns: Provided always, that if the said Term of Seven Years shall expire before the End of Forty-two Years from the first Publication of such Book, the Copyright shall in that Case endure for such Period of Forty-two Years; and the Copyright in every Book which shall be published after the Death of its Author shall endure for the Term of Forty-two Years from the first Publication thereof, and shall be the Property of the Proprietor of the Author's Manuscript from which such Book shall be first published, and his Assigns."

KEKEWICH J.
1905
MACMILLAN & CO. v. DENT.

through him." In the case of a letter the proprietor of the author's manuscript is the receiver. He may destroy it and may bring detinue for it, and, it is submitted, may sell it—*Oliver* v. *Oliver* (1)—although there is a personal right in the writer of the letter to prevent him from publishing it. That right is based not upon property, but upon breach of confidence. The proprietor of the manuscript under this Act means the proprietor of the actual piece of paper on which the letter is written. The phrase "author's manuscript" is no doubt used by the Legislature in order to exclude a copy. There is a very good reason for the distinction drawn by the Legislature between books published in the author's lifetime and posthumous books, because where, as in this case, the manuscript turns up many years after the author's death it might be very difficult to discover his legal personal representative. The question has never been the subject of decision in the English Courts, but it is referred to by the Court of Appeal in *Walter* v. *Lane* (2), where Lindley M.R., who delivered the judgment of the Court of Appeal, referring to the publication of posthumous works and to ss. 3 and 16 of the Act of 1842, says that those sections justify the conclusion that the owner of an unpublished manuscript, although not the author of it, acquires copyright in it by first publishing it, and the point is also referred to in the speech of Lord Halsbury L.C. in the same case in the House of Lords. (3) Moreover, the question has been decided in Scotland in accordance with our submission: *Maclean* v. *Moody*. (4) That the property in a letter is in the receiver appears also from *Hopkinson* v. *Lord Burghley*. (5) Therefore, Mr. and Mrs. Steeds were the proprietors of these letters, and were entitled to assign the copyright therein to the plaintiffs Smith, Elder & Co.

Danckwerts, *K.C.*, and *Sebastian*, for the defendant. We submit that Mr. and Mrs Steeds were not the proprietors of the author's manuscript within s. 3 of the Act of 1842, and that even if they were, Smith, Elder & Co. were not the assigns of the manuscript at the time of publication. The writer of a letter

(1) (1861) 11 C. B. (N.S.) 139.
(2) [1899] 2 Ch. 749, 770.
(3) [1900] A. C. 539, 548.
(4) (1858) 20 D. 1154, 1163.
(5) (1867) L. R. 2 Ch. 447.

has a proprietary interest in it in the sense that he can prevent its publication, and in that sense he is the proprietor of the manuscript, and after his death this interest devolves on his legal personal representatives: *Pope* v. *Curl* (1); *Duke of Queensberry* v. *Shebbeare* (2); *Thompson* v. *Stanhope* (3); *Gee* v. *Pritchard* (4); *Earl of Lytton* v. *Devey* (5); *Caird* v. *Sime* (6); *Labouchere* v. *Hess.* (7) All these cases shew that the jurisdiction to restrain publication is founded on a right of property in the writer of the letter. The receiver has, as Lord Hardwicke says, at most a joint property with the writer, and that does not give him a licence to publish. In *Oliver* v. *Oliver* (8) Erle C.J., while stating that the property in the paper was in the receiver, said: "So far as concerns the copyright, it may be that that is in the writer." The proprietor of the literary composition, as distinguished from the paper, is the writer. Having regard to these decisions the proprietor of the author's manuscript in s. 3 must mean, not the proprietor of the paper, but the proprietor of the literary composition which is upon the paper, in the sense of having the right to publish and to prevent publication. It is clear that during the lifetime of the author the copyright is in the author and his assigns, and no reasonable ground can be suggested why the Copyright Act should change that upon the author's death, when the object of the Act is to protect his literary compositions after his death. We say that the copyright in these letters is in the defendant as the assign of Lamb's legal personal representative, but it is enough for us to prove that it is not in the plaintiffs. Here the plaintiffs have published these letters without the consent of Lamb's personal representative, and their claim to copyright is based upon that wrongful act; but the unlawful publication of letters cannot give rise to a legal right. The plaintiffs' argument implies that any receiver of letters can publish them without leave directly the writer is dead and get copyright in them so as even to prevent the writer's own family from using them. It follows from the construction suggested by the plaintiffs that although the legal

(1) (1741) 2 Atk. 342.
(2) (1758) 2 Eden, 329.
(3) (1774) Amb. 737.
(4) (1818) 2 Swans. 402.
(5) (1884) 54 L. J. (Ch.) 293; 52 L. T. 121.
(6) (1887) 12 App. Cas. 326, 337.
(7) (1897) 77 L. T. 559.
(8) 11 C. B. (N.S.) 141.

KEKEWICH J.
1905
MACMILLAN & Co. v. DENT.

personal representative of the writer can stop publication if he interferes beforehand, yet he can do nothing if he does not discover what is going on until the letters are published. That is not a reasonable construction to put upon the Act. The only way of reconciling the statute with the common law relating to letters is to say that the proprietor of the author's manuscript means the proprietor not of the paper, but of the literary composition.

[They also referred to Webster's English Dictionary, Ogilvie's Imperial Dictionary, The Century Dictionary, Richardson's English Dictionary, Johnson's Dictionary, Cassell's Encyclopædia, and Nuttall's Dictionary with reference to the meaning of "manuscript."]

Scrutton, K.C., in reply. The question is not who has the common law right before publication, but to whom has the Legislature given the right after publication. The Act of Parliament, in using the word "manuscript," is speaking of a physical thing from which the proprietor may publish, that is to say, the piece of paper with the writing upon it. If the Legislature intended merely to give the copyright to the author and his assigns, it has adopted an extraordinary method of expressing its meaning. The words of the second part of the section are very plain, and are entirely different from the words used in the first part.

KEKEWICH J. The plaintiffs Smith, Elder & Co. claim the right to publish certain letters of Charles Lamb, which are many years old, and they say that they have purchased that right from a gentleman and lady named Steeds, who were in possession of the letters up to some ten years ago. There being no suggestion that these persons obtained the letters by theft or otherwise improperly, I must assume at this distance of time from the date of the writing of the letters that they were in the rightful possession of the letters. What that implies is really the question to be decided. There is no doubt that they assigned their rights, whatever those rights were as regards publication, to Smith, Elder & Co. If Smith, Elder & Co. have vested in them the right of publication, then, of course, they can restrain every person who is not entitled to publish, and that raises the question

whether the defendant is entitled to publish. The defendant claims also through Mr. and Mrs. Steeds, and in addition he claims through the administrator of Charles Lamb. As regards his title through Mr. and Mrs. Steeds, it is obviously a defective one, because they had already assigned everything that they could assign to Smith, Elder & Co., and nothing was left for them to assign to the defendant, and they only purported to confer on the defendant such rights, if any, as remained in them. The defendant's other title I do not understand. I do not understand how the administrator of Charles Lamb at the present day can have any property whatsoever in these letters, even on the assumption that a right of property vested in Charles Lamb at the date of his death and could pass by his will. It is not competent for me to decide on the present occasion what the meaning of Charles Lamb's will is, or whether such property as he had passed by that will. But whatever property passed it cannot, it seems to me, be now vested in the administrator of Charles Lamb when these letters of administration were granted only the other day. I thought it right to say that, because it may be that a question of that kind will arise. The defendant declines to prove his title. He says it is sufficient for him to shew that the plaintiffs, Smith, Elder & Co., have no title, and that if he satisfies the Court on that point they cannot restrain him whether he has a title or not. That is a perfectly proper view for the defendant to take if he is so advised. Therefore I will not pursue that subject further. The question which I have to consider is not whether the right of publication is vested in the plaintiffs, Smith, Elder & Co., as between them and the defendant, but whether it is vested in them abstractedly so that they have a good title. That question depends entirely upon the proper construction to be placed on a few words in the 3rd section of the Copyright Act, 1842. It is not easy to understand, but in order to understand it one must of course have in one's mind the common law as it stood at the date of the Act of Parliament. Now, about the common law up to a certain point there is no doubt whatever. I have been referred to a large number of cases, beginning with *Pope* v. *Curl* (1),

(1) 2 Atk. 342.

KEKEWICH J. 1905 MACMILLAN & Co. v. DENT.

decided by Lord Hardwicke ; but I venture to say no reference to any case at all was really necessary. Certainly I shall not refer to many of them. I have said that the common law is perfectly clear up to a certain point, and I use that expression advisedly, because I think that beyond that point there is a great deal of doubt about it. Counsel for the defendant referred me, among other cases, to *Caird* v. *Sime* (1), which is an important decision of the House of Lords touching the right of publication of certain lectures on Moral Philosophy delivered by Dr. Caird. He quoted largely from the speech of Lord Halsbury L.C., but to my mind, although I am far from saying that the Lord Chancellor did not really express the same idea in other language, the precise position is more accurately stated, as regards language, by Lord Watson. He says (2): "The author of a lecture on Moral Philosophy, or of any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public." He calls it "a right of property in his work." The Lord Chancellor in his speech calls it "a proprietary right in his unpublished literary productions." In many of the other cases the presiding judge has used the expression "right of property." I think the phrase "proprietary right" is peculiar to the speech of the Lord Chancellor in *Caird* v. *Sime*. (1) But some of the judges have used a different expression and called it "a joint property," that is, a right in the author of the letter—I am speaking of a letter—jointly with the receiver. Bacon V.-C., in a case of *Earl of Lytton* v. *Devey* (3), said: "The property in the letters remains in the person to whom they are sent." But it is obvious from his judgment that he perfectly understood that there was a right of property in the sender, and no doubt he was speaking there of the property in the letters as the property in the paper with the writing upon it—the actual physical thing, and nothing more—and that, of course, is in the person to whom the letter is sent. It has been decided that he can maintain an action of detinue for it by reason of his right of property in the

(1) 12 App. Cas. 326. (2) 12 App. Cas. 343.
(3) 54 L. J. (Ch.) 295.

physical thing. Up to that point, it seems to me, the law is perfectly clear. Beyond it there is very little light. What is the right of property retained by the author, and how it ought to be defined, none of the judges tell us. To read again Lord Watson's words: "It is a right of property in his work which entitles him to prevent its publication by others." That is the right of property. What other privileges it gives him, how otherwise you can spell out the right of property, I am unaware. I do not think there is any judgment anywhere which assists us at all. Even the numerous judgments of Lord Eldon, in *Gee* v. *Pritchard* (1), although they are extremely instructive, do not, so far as I have studied them, really give us any guide to determine what the right of property is beyond this, that it entitles the author to prevent the publication of his work by others. I need not go beyond that in the present case. The questions which I have referred to are well deserving of discussion, but on the present occasion they are purely academic, because it is sufficient for me to say that, according to the law, the writer of the letter, notwithstanding that he has sent it to somebody else, and that that person has a right to the physical thing, retains that peculiar right of property which entitles him and his legal personal representatives to prevent its publication by others. Now, that being the common law, what does this statute mean? The section is divided into two parts, and the division is, to my mind, the origin of the puzzle. The first part of the section deals with a book which is published in the lifetime of its author, and it is common ground that "book" includes a letter. It says: "The copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure" for a certain time, "and shall be the property of such author and his assigns." Then, having enacted that, the Legislature goes on to deal with the case of the copyright in a book published after the death of its author, and it does not say, as it would have been extremely easy to say in plain language, that the copyright in that book shall remain in the author or his assigns or his legal personal representatives. I am not professing to frame the words in which it could have been enacted, but no difficulty would have been felt

(1) 2 Swans. 402.

KEKEWICH J.
1905
MACMILLAN & Co. v. DENT.

by any reasonably experienced draftsman in saying in plain and unmistakable language that the copyright belonged to those who claimed through the author, whether by assignment or as legal personal representatives, if that had been the intention of the Legislature. I think it is fair to conclude that the Legislature did not intend that. But what did it intend? That it shall be the property of the proprietor of the author's manuscript. I will not go further for the moment. I do not think it necessary to consult dictionaries to understand what the meaning of the word "manuscript" is. "Manuscript," of course, means that which is written by the hand. That, in the case of a letter, would be the actual letter written by the writer with his pen or pencil. I have no doubt that in these days the Court would have no difficulty in extending that to a type-written letter. It might even, I think, without difficulty, extend it to a printed letter, if the author used a private printing press. I have no doubt also that if the writer of the letter instead of using his own hand used that of an amanuensis, to whom he dictated the letter, that would be a manuscript within the meaning of this Act. I go further and say that if the writer wrote out the letter with his own hand and then had a copy made of it in order to send it away, and made that really the original letter, though in truth it was more a copy than an original, that might be a manuscript. It seems to me that that which proceeds from the writer as his own work in the first instance must be the author's manuscript. Also, "manuscript" must mean that which fills the place of the manuscript in the ordinary sense; that is to say the letter written by the author's own hand. If it was the letter though not first written which he intended to be the original, then that is the author's manuscript. Take the case of a man sending a letter and keeping a copy of it, I should think the letter sent and not the copy kept would be the author's manuscript. So far there seems to be little difficulty in understanding what the Legislature meant. But then comes the question, who is "the proprietor of the author's manuscript"? If we can ascertain that, then there is no difficulty in determining what the statute means, because it says that the copyright shall be the property of the proprietor; not that the proprietor shall have a qualified proprietary right,

not that he shall have the property jointly with anyone else, but that it shall be *the* property, and the Legislature being of course cognizant of all the decisions of the common law must be taken to have meant the exclusive property, of the proprietor. Now who is "the proprietor of the author's manuscript"? According to the common law there are two proprietors, that is, the receiver of the letter, who is entitled to the physical thing and who can bring detinue for it, and the writer of the letter, who has that peculiar right of property which entitles him to prevent publication by others. Did the Legislature here intend to perpetuate any notion of that kind in the proprietor of the author's manuscript? It seems to me, having regard to the division of the section into two parts, to which I have already called attention, and to the care of the Legislature not to repeat that in the second part, as it might have done in slightly different language, that "the proprietor of the author's manuscript" must mean the proprietor of the physical thing—that the manuscript here is the actual paper on which the writing is and the writing upon it. That seems to me the only legitimate construction which I can place upon those words. The result is that Mr. Steeds and his wife were the proprietors of these letters—that is, of the manuscript. There can be no question that it was from that manuscript that the letters were first published. The original letters were sent to Smith, Elder & Co. in order that they might be published, and the publication was from those original letters, and by the assigns of Mr. and Mrs. Steeds. I put a question to the plaintiffs' counsel in reply as to the meaning of "assigns" in the section, and he endeavoured to convince me that the right interpretation was that "assigns" meant assigns of the right of publication. I do not think that that is the strict construction of the section. The section says: "The proprietor of the author's manuscript from which such book shall be first published," which is put in parenthetically, "and his assigns." I think that "assigns" must there mean the assigns of the author's manuscript. Messrs. Smith, Elder & Co. were the assigns of the author's manuscript, and in my view they fill that position. The result is, it seems to me, that I must come to the conclusion that the Legislature intended that Mr. and Mrs. Steeds, having

KEKEWICH J. 1905 MACMILLAN & Co. v. DENT.

these letters rightfully in their possession, were entitled to publish them themselves, or to hand them over to Messrs. Smith, Elder & Co. for publication, and to give them the right of publication, and that that having been done, nothing remained in Mr. and Mrs. Steeds which they could pass to anyone, except, of course, the right to the letters themselves. Those they retained and those they could part with. The right of publication, it seems to me, was gone.

[His Lordship accordingly made a declaration that the right of publication of these letters was vested in the plaintiffs, Smith, Elder & Co., and he gave the plaintiffs liberty to apply for an injunction. He also directed an account of profits, the claim for delivery up not being insisted upon, and ordered the defendant to pay the costs of the action. His Lordship granted a stay of execution as regards the account and taxation of costs for a fortnight, to enable the defendant to consider his position, and if the defendant appealed within that time pending the hearing of the appeal.]

Solicitors: *Cheston & Sons; Surr, Gribble & Oliver*, for *S. Hosgood, Pershore.*

H. B. H.

In re BOURNE.
BOURNE *v.* BOURNE.

[1902 B. 4503.]

FARWELL J.
1905
Nov. 16.

Partnership—Deceased Partner—Executor's Lien—Partnership Real Estate—Deposit of Title Deeds by surviving Partner for his own Debt—Notice—Priorities—The Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 39.

A surviving partner can mortgage or sell partnership real estate for the purposes of the business, and the mortgagee or purchaser is not concerned to see to the application of the money unless he has notice that it is going to be used for an improper purpose.

The principles of *In re Langmead's Trusts*, (1855) 20 Beav. 20; affirmed on appeal, 7 D. M. & G. 353, applied.

The equitable mortgagee of a surviving partner by deposit of the title deeds of partnership real estate has priority over the lien of a deceased partner's executors on the same deeds for his share of the partnership assets.

In re Valletort Sanitary Steam Laundry Co., Ld., [1903] 2 Ch. 654, 660, followed.

By articles of partnership dated July 1, 1873, W. T. Bourne and G. Grove entered into partnership as timber, slate, and coal merchants for a term of twenty-one years under the style of "Bourne & Grove." The articles provided that if either partner should die during the partnership his executors or administrators should be entitled to the capital belonging to and brought in by the deceased partner, with 5 per cent. interest, to be secured by the bond of the surviving partner; and the surviving partner was also to join in a covenant with and give a bond to the executors or administrators of the deceased partner for indemnifying them and the estate of the deceased partner from the debts and liabilities of the partnership at the time of such death, and upon such last-mentioned covenant and bond being given to them the executors or administrators of the deceased partner were to release and assign unto the surviving partner all their share, right, and interest in the goodwill and assets of the partnership.

In July, 1894, the partnership term expired, and thereafter

FARWELL J. 1905 BOURNE, *In re.* BOURNE *v.* BOURNE.

the partners continued to carry on business in co-partnership on the terms of the partnership articles, so far as they were applicable to a partnership at will, until the death of G. Grove on May 9, 1901. After the death of G. Grove the business was carried on by W. T. Bourne in the partnership name, but he did not execute a covenant or give a bond to G. Grove's executors as provided by the partnership articles. W. T. Bourne died in September, 1902, and this action was then commenced against his executors to administer his estate, which was insolvent, and by an order made in the action on December 8, 1903, it was ordered that the executors of G. Grove should be at liberty to prove for 3000*l.* and their costs against the estate of W. T. Bourne, and were to have a lien for the amount of such debt and costs on the assets of the partnership or the proceeds of sale thereof. By orders made on December 1, 1902, and August 3, 1904, certain accounts and inquiries were directed, and the master, by his certificate made in answer to the said orders, found (inter alia) that the joint estate of the partnership firm on September 3, 1902, the date of the death of W. T. Bourne, consisted of certain real estate, and that the title deeds of this real estate had been deposited by W. T. Bourne on February 7, 1902, with Messrs Berwick & Co., bankers, accompanied by a memorandum of charge of the same date signed by W. T. Bourne in the name of "Bourne & Grove." The master further certified that the facts in relation to the said deposit were as follows: "Messrs. Berwick & Co. were the bankers of the firm of Bourne & Grove during the late partnership down to the death of the partner George Grove. At the death of the said George Grove the partnership account at the bank was in debit to the amount of 6476*l.* 9*s.* 6*d.* After the death of George Grove the testator, William Temple Bourne, continued the account at the banking-house of Messrs. Berwick & Co. under the same name of 'Bourne & Grove,' for the exclusive purposes of the business carried on by him, and operated upon such account in the ordinary course of the said business. Between the death of George Grove and the date of the memorandum of deposit the testator paid into the bank to the credit of the said accounts sums amounting in all to 10,073*l.* 9*s.* 7*d.*, and drew out sums amounting to 8685*l.* 9*s.* 1*d.*

The overdraft on February 7, 1902, was 5088*l.* 9*s.* At this time the said Messrs. Berwick & Co. required security to be given for the said overdraft, in consequence whereof the testator, William Temple Bourne, deposited the title deeds of the said hereditaments with Messrs. Berwick & Co., and signed the said memorandum of deposit by way of security for such overdraft. Between the date of the said memorandum of deposit and his death the testator, William Temple Bourne, paid to the credit of the said account sums amounting in all to 6825*l.* 9*s.* 8*d.*, and drew out sums amounting in all to 6200*l.* 13*s.* All cheques upon the said account were drawn in the name of 'Bourne & Grove,' and appeared to have been drawn for the purposes of the said business. There was due to Messrs. Berwick & Co. in respect of the said overdraft at the death of the testator the sum of 4463*l.* 12*s.* 4*d.*, and bankers' charges and interest."

After the death of W. T. Bourne the business was carried on as a going concern by a receiver appointed in the action, and was sold under an order of April 6, 1903, for a lump sum, and the proceeds of sale were paid into Court and invested in consols. The property subject to the memorandum of deposit was represented by a sum of about 5300*l.*, being part of such proceeds of sale, and was therefore insufficient to pay both the bankers and G. Grove's executors in full.

The action now came on for further consideration, and one of the questions raised was whether G. Grove's executors or the bank were entitled to priority in respect of the 5300*l.*

Upjohn, K.C., and *Stamp*, for parties having the conduct of the action.

Jenkins, K.C., and *P. Wheeler*, for G. Grove's executors. The lien of the executors of a deceased partner on the joint assets for the amount due to him takes priority over the equitable mortgage created by the surviving partner on the partnership real estate for his private debt. The partnership articles created a clear lien which has not been discharged. A surviving partner can mortgage partnership assets for a partnership debt, but not for his own debt: *In re Clough.* (1) Here the partnership overdraft,

(1) (1885) 31 Ch. D. 324.

FARWELL J. 1905 BOURNE, *In re*, BOURNE *v.* BOURNE.

by the operation of the rule in *Clayton's Case* (1), was paid in due course through the banking account before February, 1902, and the joint debts were then cleared off. The bankers knew of Grove's death, and are not entitled to priority as against his executors.

Butcher, K.C., and *Martelli*, for the bankers. Where a surviving partner continues the business with the consent of the executors of the deceased partner he can create a lien on or sell the assets: *Power* v. *Banks*. (2) The executors' lien is only an equity, and in Lindley on Partnership, 7th ed. p. 390, the author says, "To hold, however, that this lien could be enforced against a person purchasing partnership property, would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade . . . . a person who bona fide purchases from one partner specific chattels belonging to the firm, acquires a good title to such chattels, whatever liens the other partners might have had on them prior to their sale"; and for this he cites *In re Langmead's Trusts* (3), which was affirmed on appeal. (4) It is submitted that the principle of that case applies to any partnership assets with which a partner deals. Although the firm's overdraft was paid off through the banking account, there was nothing to put the bank on inquiry. The account was continued in the firm's name without alteration, and was carried on exclusively for business purposes. Secondly, we have an equitable charge and the possession of the title deeds, and that entitles us to priority over the executors: *Rice* v. *Rice* (5); *In re Castell & Brown, Ld.* (6); *In re Valletort Sanitary Steam Laundry Co., Ld.* (7)

Jenkins, K.C., in reply. The principles contended for have never been applied to land which is known to be partnership property. A partner dealing with such title deeds is not dealing in the ordinary course of partnership business.

[FARWELL J. How do you distinguish *In re Langmead's Trusts?* (8)]

(1) (1816) 1 Mer. 572.
(2) [1901] 2 Ch. 487, 496.
(3) 20 Beav. 20.
(4) 7 D. M. & G. 353.
(5) (1853) 2 Drew. 73.
(6) [1898] 1 Ch. 315, 321.
(7) [1903] 2 Ch. 654, 660.
(8) 20 Beav. 20; on appeal, 7 D. M. & G. 353.

It was not a case of real estate, but of a chattel, and is so treated in Lindley on Partnership, 7th ed. p. 390, and should, it is submitted, be confined to personal estate. Bourne was really the owner of the business subject to the executors' lien, and was borrowing money on the partnership real estate for his own purposes. Lindley on Partnership, 7th ed. p. 389, states that "the lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them; and it is therefore available against their executors, execution creditors, and trustees in bankruptcy." The same principle applies, it is submitted, to a creditor who has taken a security like this with notice: *Cavander* v. *Bulteel.* (1) The Irish case of *In re Ryan* (2) is also in our favour.

FARWELL J. In my opinion this case is covered by the authorities that have been cited. Grove died on May 9, 1901. At that time the firm was in debt to their bankers, Messrs. Berwick & Co. Mr. Bourne, who was the surviving partner, carried on the business and got an overdraft from the bank on the security of the deposit of title deeds belonging to the partnership. The circumstances are set out in the master's certificate, and I need not repeat them. Now, the rule in *Clayton's Case* (3) would make the actual indebtedness of the firm at the death of Grove disappear before the date at which the security was given, but on the authority of *In re Langmead's Trusts* (4) it appears to me that the lien that Grove's executors had for the amount due to him would not interfere with the raising of money by giving security for an overdraft for the purpose of the business carried on by the surviving partner. The bankers, it is admitted, knew of the death of Grove. They also knew that the account was not altered in any way. They knew that they were only paid off, if they ever thought about it, by the application of the rule in *Clayton's Case.* (3) It certainly would be rather strong to say that, because the bankers were paid off by reason of the rule in *Clayton's Case* (3), they could not possibly take a security afterwards without

(1) (1873) L. R. 9 Ch. 79.
(2) (1868) I. R. 3 Eq. 222.
(3) 1 Mer. 572.
(4) 20 Beav. 20; on appeal, 7 D. M. & G. 353.

FARWELL J.
1905
BOURNE, *In re.*
BOURNE *v.* BOURNE.

being fixed with some impropriety of conduct. In my view *In re Langmead's Trusts* (1) shews that that is not the law. The 39th section of the Partnership Act, 1890, declares the nature of a partnership lien to be as follows: "On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all the persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm, and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm." Lord Lindley, in his notes on that section (2), refers to *In re Langmead's Trusts* (1), which, I observe, he there also treats as though it related only to specific chattels. I venture to think that that is an oversight, because that case did not deal with a chattel at all, but with a chose in action, namely, a policy of assurance. It was a case where the partners were brewers, and part of the partnership property was a policy of assurance. It does not appear how they acquired it; probably they had taken it as security for some loan. This was sold by the surviving partner, and the deceased partner's executors claimed a paramount title. Lord Romilly puts the case in this way (3): "I think that the case of the petitioner cannot be put higher than one of an express trust vested in William Langmead to sell the property and apply the proceeds in payment of the debts of the partnership. If that had been the case, a purchaser from William Langmead, even with express notice of that trust, would not have been bound to see to the application of the purchase-money." That is confirmed by the Court of Appeal (4), by Knight Bruce L.J. on the same ground and by the other Lord Justice on a different ground. I observe that Lord Lindley in his treatise (5), when speaking

(1) 20 Beav. 20; on appeal, 7 D. M. & G. 353.
(2) Lindley on Partnership, 7th ed. p. 390.
(3) 20 Beav. 20, 25.
(4) 7 D. M. & G. 353.
(5) Lindley on Partnership, 7th ed. p. 388.

of the lien which each partner has on the property of the firm, calls it "this right, lien, quasi-lien, or whatever else it may be called," and I think that the argument of counsel on behalf of the executors of the deceased partner is founded on a misapprehension of the nature of this right, by treating it as though it were in fact an equitable mortgage security. The right is as stated in the Partnership Act, and it cannot be put higher, as Lord Romilly says, than a trust to realize and pay the debts, with, of course, a receipt clause. That being so, what has happened here is that the surviving partner, finding debts still due, borrows money and continues to carry on what had been the partnership business, and which had then become his. So far as I can see, there is nothing whatever to put the bank upon any inquiry or to fix them with notice that he was intending to use the money otherwise than in accordance with the trust to which Lord Romilly refers in *In re Langmead's Trusts.* (1) If that was so, the case is indistinguishable in principle from *In re Langmead's Trusts.* (1) The Irish case of *In re Ryan* (2) must be explicable, although it is difficult to follow the very lengthy judgments, on the ground that, applying *In re Langmead's Trusts* (1), the purchaser or mortgagee had notice that the purpose for which the sale or mortgage was being made was improper. Of course, if a man knows as a fact that the surviving partner is going to pay a gambling debt or something of that sort, I do not say for a moment that he would be assisted by *In re Langmead's Trusts* (1), which puts it, to my mind, on a very intelligible ground, namely, that a surviving partner is in the position of a trustee who has power to sell and power to give receipts, and that a purchaser from him is entitled to rely on the power to give receipts, except so far as he is fixed with express knowledge that an improper application of the purchase money is intended. There is also no answer to the second point, that the bankers, having the possession of the title deeds, have the better equity. The executors of the deceased partner might have got possession of the deeds, but they did not. The bankers got them, and therefore, on the authority of the cases cited, they

(1) 20 Beav. 20; 7 D. M. & G. 353. (2) I. R. 3 Eq. 222.

FARWELL J. 1905 BOURNE, *In re.* BOURNE, *v.* BOURNE.

have priority over the executors of the deceased partner and over the joint creditors of the partnership business.

Solicitors: *P. W. Chandler; Badham & Comins; Maples, Teesdale & Co.*

H. L. F.

FARWELL J. 1905 *Nov.* 21.

In re GOSSELIN. GOSSELIN *v.* GOSSELIN.

[1905 G. 2042.]

Will—Construction—Condition requiring Resettlement—Hereditaments—Money held upon Trust for Investment in Land.

G. by his will devised real estate to his son for life, with remainders over in strict settlement, and declared that the estate for life limited to his son was limited upon condition that he should enlarge the estate in tail male, or in tail, to which he was entitled under his grandfather's will, in all the hereditaments devised by that will, or subject to the limitations thereof, and resettle the same to the uses limited by the testator's will. By the grandfather's will large estates were devised to the testator for life, with remainder to his son in tail male, parts of which had been sold, and the purchase-moneys were, at the testator's death, in the hands of trustees subject to a trust for reinvestment in land:—

Held, that these moneys were included in the word "hereditaments" and must be resettled.

SIR MARTIN GOSSELIN, the testator in this matter, who died on February 26, 1905, by his will dated April 20, 1899, gave all his real estate to his trustees in trust for his wife until some child or grandchild of his entitled in possession under the subsequent limitations should attain twenty-five, and subject thereto he devised all his real estate to his eldest son Alwyn for life, with remainder to the use of his first and other sons successively in tail male, with remainders over in strict settlement. And the testator thereby declared that the estate for life in the hereditaments thereby devised which he had thereby limited to his said son Alwyn was limited "upon condition that within twelve calendar months after I shall die or he shall attain the age of twenty-one years, whichever shall last happen . . . . he shall enlarge the estate in tail male or in tail to which he is entitled under the will of my late father in all the hereditaments devised

by that will or then subject to the limitations thereof to which my said son Alwyn is entitled for that estate in tail male or in tail and shall resettle those hereditaments to the uses hereby limited of the hereditaments hereby devised, but not so as to increase or multiply charges." And the will contained a gift over of the same hereditaments if the testator's son Alwyn did not resettle the hereditaments to which he was entitled under his grandfather's will, in accordance with the said condition, to the persons entitled in remainder after his death.

His eldest son had attained the age of twenty-one years in 1904.

The property to which the said eldest son was entitled for an estate in tail male under his grandfather's will included the proceeds of sale of certain lands, which had been sold under a power in the will, and were subject to a trust for reinvestment in land, to be settled to the same uses. These moneys remained in the hands of the trustees and had been invested.

This summons was taken out by the testator's eldest son Alwyn for the determination of the question whether, under the condition set out above, he was bound to resettle the stocks and securities representing the proceeds of sale above mentioned.

The defendants were the trustees of the testator's will, one of whom was also the surviving trustee of the grandfather's will, the testator's wife, and three daughters, who, as the testator had left no other sons, were entitled to the first estates in remainder expectant on the plaintiff's life estate.

Method, for the summons. Conditions must be construed strictly. At the date of the testator's death the son had an absolute right to take these moneys either as moneys or as land. Therefore the question whether they were real or personal estate must be determined by their nature at the time: see judgment of Jessel M.R. in *Chandler* v. *Pocock*. (1) They were then actually personal estate, and therefore could not be described as hereditaments, and are not included in the direction to re-settle.

(1) (1880) 15 Ch. D. 491, 498.

FARWELL J.
1905
GOSSELIN, *In re.* GOSSELIN *v.* GOSSELIN.

Brabant, for the testator's three daughters. The condition is that the son shall enlarge the estate tail to which he is entitled under the grandfather's will "in the hereditaments devised by that will or subject to the limitations thereof." That plainly includes money subject to a trust for investment in land. He had an estate tail in these moneys, and unless he disentailed, they would descend to his heir in tail. That clearly brings them within the word "hereditaments."

Basset v. *St. Levan* (1) is exactly in point. There the words were "estates and hereditaments," but the word "estates" cannot carry it any further.

In re Duke of Cleveland's Settled Estates (2) is an authority that moneys subject to a trust for investment in land passed as land, and the remarks of the Master of the Rolls in *Chandler* v. *Pocock* (3) were commented on and distinguished.

W. A. Russell, for the trustees.

Method, in reply.

FARWELL J. The testator in this case has subjected the estate given by his will to his eldest son to a condition that he shall "enlarge the estate in tail male or in tail to which he is entitled under the will of my late father in all the hereditaments devised by that will, or then subject to the limitations thereof," and shall resettle those hereditaments to the uses limited by the testator's will of the hereditaments thereby devised. Under the grandfather's will large real estates passed, parts of which had been sold, and the moneys arising from those sales were held, by the trustees of the grandfather's will, upon trust to reinvest in land to be settled to the uses of the will. The question in this case is: Does the condition for resettlement in the testator's will compel the son to resettle the moneys that represent the part of the real estate sold? and that, of course, depends upon the question whether these moneys can be properly described as hereditaments. In my opinion, on the true construction of the will before me, these moneys can properly be so described, and must accordingly be resettled as directed in order to fulfil the

(1) (1894) 43 W. R. 165. (2) [1893] 3 Ch. 244.
(3) 15 Ch. D. 491, 498.

condition. I am bound to ascertain how the property stood at the date of the testator's death and to construe the will in the light of the facts then existing. The word used in the will is "hereditaments." That would seem naturally to mean "things capable of being inherited"; and money subject to a trust for reinvestment in land, held in the hands of trustees, as this money was at the date of the testator's death, satisfies that description. I am assisted in coming to this conclusion by Lindley L.J.'s judgment in the Court of Appeal in *In re The Duke of Cleveland's Settled Estates* (1): "Money which a testator has not got into his own hands, and which he has no right to have in his own hands, and which is held upon trust for investment in land, is, in our opinion, to be treated as real estate, although, if he has power to dispose of such money, he can dispose of it either as land or money, as he may think right."

That appears to me to apply to this case. The money was certainly not in the hands of the testator, nor had he any right to have it in his hands; he was only the tenant for life, and it was held in the hands of trustees for the purpose of investment in land.

But besides this, the case is, in my opinion, undistinguishable from *Basset* v. *St. Levan.* (2) My only difficulty has been that the learned judge in that case seems not to have given so wide a meaning as I have to the word "hereditaments." He treats the question as being whether he could use the word "hereditaments" in a larger sense than its technical one. He says, "Now what is the meaning of 'hereditaments'? Mr. Challis defined it, in his argument, as anything 'capable of being inherited according to common law.' I think that is well founded, but ought I to put such a meaning on the word when I am construing a will? The Courts have gone a long way in construing words in wills according to their technical meaning, especially in the case of *Leach* v. *Jay.* (3) But that decision was based on the fact that the word 'seisin' is the most technical word in the law, and I do not think I am bound to put such a strict construction on the word 'hereditament' in the

(1) [1893] 3 Ch. 244, 250.
(2) 43 W. R. 165, 167.
(3) (1877) 6 Ch. D. 496; (1878) 9 Ch. D. 42.

FARWELL J. 1905 GOSSELIN, *In re.* GOSSELIN *v.* GOSSELIN.

absence of further authority. Moreover, the word 'hereditament' is enlarged here by the addition of the word 'estates.'".

With all possible respect for the judgment in that case, I am of opinion that without any enlargement the word "hereditaments," in its natural meaning, is sufficiently large to describe money held in trust for investment in land in a case like the present, in which the testator possesses no power to dispose of it, either as money or land, as he pleases. There must be a declaration that these moneys are bound by the condition.

Solicitors: *Meynell & Pemberton.*

J. R. B.

FARWELL J. 1905 *Nov.* 24, 28.

In re GRANT, BULCRAIG & CO.

[1904 C. 3769.]

Practice—Taxation—Solicitor's Bill of Costs—Jurisdiction of Taxing Master—Substituting an Item—Correcting Error in Casting—Order XXVIII., *r.* 11—*5l. Deposit on Presentation of Bankruptcy Petition—Bankruptcy Rules*, 1886, *rr.* 112 (1.), 125, 147—*Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

In taxing a bill of costs under the Solicitors Act the taxing master has no jurisdiction to substitute, for an item admittedly not chargeable, an item properly chargeable but omitted from the bill; for that in fact is altering the bill, which can only be done on a proper application to the Court: *In re Walters*, (1845) 9 Beav. 299. But he can correct an error in the casting of the bill, although it alters the amount, for that is not taxation, but arithmetic.

The 5*l.* deposit paid into Court under r. 147 of the Bankruptcy Rules, 1886, on the presentation of a bankruptcy petition is, by virtue of sub-r. 1 of r. 112 of the same Rules and the scale of costs thereunder, properly entered as a disbursement in a solicitor's bill of costs, and does not fall within the principle of *In re Buckwell & Berkeley*, [1902] 2 Ch. 596.

On December 8, 1904, a Mr. Croft obtained under the Solicitors Act, 1843, s. 37, the common order to tax three bills of costs of 110*l.* 3*s.* 8*d.*, 16*l.* 13*s.* 10*d.*, and 7*l.* 14*s.* 6*d.*, amounting altogether to 134*l.* 12*s.*, that had been delivered to him by Messrs. Grant, Bulcraig & Co. for work done by them as his solicitors. The order contained the usual direction that if more than one-sixth was taxed off the bills the solicitors were to pay

the costs of the taxation, but if less than one-sixth was taxed off then Mr. Croft was to pay the costs of the taxation. The taxing master taxed off 22*l.* 4*s.* 6*d.*, and on November 14, 1905, he certified that he had taxed and settled the bills at 111*l.* 7*s.* 6*d.*, and that the bills as taxed and settled entitled the solicitors to the costs of taxation. He arrived at this result by overruling three objections that had been carried in on behalf of Mr. Croft. The first objection was as to an item of 3*s.* 4*d.* The master held that this item was not chargeable, but, inasmuch as the solicitors had omitted an item of 4*s.* 6*d.* for which they could properly have charged, he allowed the 3*s.* 4*d.* to stand to cover the omitted item. The second objection was as to an error of 1*l.* in the casting of the bill of 7*l.* 14*s.* 6*d.* It was contended that the amount of the bill as delivered could not be altered; but the master held that the 1*l.* was a mere mistake in addition which he could treat as a clerical error, thereby reducing that bill to 6*l.* 14*s.* 6*d.* and the total amount to 133*l.* 12*s.* The third objection was as to a sum of 5*l.*, being the deposit paid into the Bankruptcy Court on the presentation of a bankruptcy petition. It was contended that this deposit should have been entered in the solicitors' cash account, and not in their bill of costs, and should be taxed off and carried into the cash account. The master held that this 5*l.* was a Court fee payable on the presentation of the petition, and was a payment made in pursuance of the professional duty undertaken by the solicitor, and ought to be allowed as a professional disbursement in the bill of costs: *In re Remnant.* (1)

The 111*l.* 7*s.* 6*d.* was arrived at by deducting the 22*l.* 4*s.* 6*d.* from the 133*l.* 12*s.*; but the 134*l.* 12*s.*, less one-sixth thereof, left 112*l.* 3*s.* 4*d.*, which being more than 111*l.* 7*s.* 6*d.* would give Mr. Croft the costs of the taxation. If, however, the master's certificate stood, one-sixth off 133*l.* 12*s.* left 111*l.* 6*s.* 8*d.*, which being less by 10*d.* than the 111*l.* 7*s.* 6*d.*, gave the solicitors the costs of taxation. Mr. Croft thereupon took out this summons to review the master's ruling on the above objections; and it was conceded that, if any one objection prevailed, Mr. Croft would be entitled to the costs of the taxation.

(1) (1849) 11 Beav. 603.

FARWELL J. 1905 GRANT, BULCRAIG & CO., *In re.*

Ashton Cross, for the summons. As to the first two items, the words of the Act are imperative, and the solicitor is bound by the bill he has delivered. The master has really altered the bill, and he has no jurisdiction to do that: *In re Wells* (1); *In re Carven* (2); *In re Clark* (3); *In re Carthew.* (4)

[FARWELL J. Why cannot an error in casting up be corrected? Is the addition of the bill a necessary part of it?]

Because it is *the amount* of the bill as delivered which is the guide in arriving at the one-sixth. The amount of the bill is part of the bill, and it is one-sixth of that amount which has to be considered in deciding who is to pay the costs of the taxation. Then as to the 5*l.* deposit. It is not a Court fee, but is paid in under r. 147 of the Bankruptcy Rules, 1886, as security to cover the fees and expenses of the official receiver and may be paid out again, and r. 125 of the same Rules prescribes the priority in which this deposit is to be paid out of the proceeds of the estate. It is really on the same footing as the 5*l.* paid into Court on an application for interrogatories, and is within the principle of *In re Buckwell & Berkeley* (5); *In re Kingdon & Wilson.* (6) Therefore, it is not a disbursement, and *In re Remnant* (7) does not apply.

Cozens-Hardy, for the solicitors. As to the 3*s.* 4*d.*, the taxing master obviously exercised his discretion on the item, and the Court will not interfere. As to the 1*l.*, it was a clerical error, and it is monstrous to say that it cannot be amended. It is not an error in the bill itself, because the items remain the same, but it is merely a mistake in the addition which can be corrected under Order XXVIII., r. 11. In *Chessum & Sons* v. *Gordon* (8) an inadvertent omission of 100*l.* was corrected as an accidental slip. If necessary, I ask to amend the order to tax by correcting the amount of the bill entered in the order. As to the 5*l.* deposit, there is a distinction in the practice between the 5*l.* paid in for discovery and the 5*l.* paid in on filing a bankruptcy petition. It is obviously not part of the duty of a solicitor to

(1) (1845) 8 Beav. 416.
(2) Ibid. 436.
(3) (1851) 13 Beav. 173.
(4) (1884) 27 Ch. D. 485, 493.
(5) [1902] 2 Ch. 596.
(6) Ibid. 242.
(7) 11 Beav. 603.
(8) [1901] 1 K. B. 694.

provide the 5*l.* for discovery, but under the Bankruptcy Rules you must deposit 5*l.* before the petition is presented. This deposit is not paid back in any event, even if a receiving order is made. It is more in the nature of a Court fee in bankruptcy.

[FARWELL, J. *In re Buckwell & Berkeley* (1) seems to be in point, and to be against you.]

The facts there were different, and it is submitted that the principle of that case does not apply to this item. If a solicitor accepts instructions to file a bankruptcy petition, it is part of his professional duty to provide this 5*l.* just as much as if he was issuing a writ in an ordinary action. Here the taxing master, in accordance with the settled practice in the Chancery Taxing Office, properly allowed this item as a disbursement.

Ashton Cross, in reply. I do not admit the alleged practice.

Cur. adv. vult.

Nov. 28. FARWELL J. This is a summons to disallow three items allowed by the taxing master. The taxation is under the Solicitors Act, 1843, and by an order, dated December 8, 1904, the taxing master was ordered to tax and settle the bills of fees, charges, and disbursements, amounting respectively to 110*l.* 3*s.* 8*d.*, 16*l.* 13*s.* 10*d.*, and 7*l.* 14*s.* 6*d.*, and the order contained the usual provision, in accordance with the Act, that, if one-sixth be taxed off, the solicitors were to pay the costs of taxation. The three items in dispute are 3*s.* 4*d.*, 1*l.*, and 5*l.*, and I am told that the costs of taxation will probably depend on the allowance or disallowance of any one of these.

There is an unbroken line of authorities since the passing of the Act which establishes that, for the purposes of taxation under the Act, and the costs thereof, the solicitor is bound by the bill that he has delivered. In the case of *In re Carven* (2) Lord Langdale says that, "if a solicitor has delivered his bill, he is bound by it, and the taxation must be on that bill; he is not entitled, as of course, to reduce his demand, or to reserve the power of delivering a bill containing other charges." This general rule was recognized and approved by the Court of Appeal

(1) [1902] 2 Ch. 596. (2) 8 Beav. 436, 438.

FARWELL J. 1905 GRANT, BULCRAIG & Co., *In re.*

in *In re Heather* (1); and again in *In re Thompson* (2), where Cotton L.J. says (3): "Now, it has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it a right to have that bill taxed. . . . . The rule has been carried so far that even where objections have been made to particular items of a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purpose of reconsideration and have struck out certain items, the Court has held that the bill to be taxed must be the bill as it was originally sent in and not the bill as amended." Nor has the taxing master any power to add or strike out items; his functions, as defined by the order, are to tax and settle. To tax is to deal seriatim with each item by way of allowance or disallowance. To settle is finally to ascertain the amount (if any) recoverable. The only way in which the solicitor can add or strike out items, or increase amounts, is by special application to the Court, as was done in *In re Walters* (4) and *In re Whalley* (5): but such alteration is not allowed to affect the costs of taxation of the original bill; it is merely to prevent the solicitor from losing charges which he is entitled to make, but has overlooked; in neither case is he allowed to diminish the amount of his charges. The reason for the rule is stated by Cotton L.J. in *In re Thompson* (3): "It was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which could not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which they knew could stand taxation." The solicitor is treated strictly because he is dealing with his client in a matter in which the solicitor is an expert and the client is not, but the reasoning has no application to details which are not the subject of taxation and the accuracy of which the client is as well able to test as the solicitor; such matters become mere matters of evidence, and the taxing master may allow the solicitor to correct blunders therein if, in his discretion, he thinks proper to do so. Thus, in *Williams* v. *Barber* (6) it was held that a mistake in

(1) (1870) L. R. 5 Ch. 694.
(2) (1885) 30 Ch. D. 441.
(3) Ibid. 448.
(4) 9 Beav. 299.
(5) (1855) 20 Beav. 576.
(6) (1813) 4 Taunt. 806.

the dates (e.g., Trinity Vacation instead of Hilary) did not vitiate a bill so as to support a motion for a new trial on the ground that the plaintiff had not delivered a correct bill such as was required by the statute then in force. By parity of reasoning, I think that the taxing master might tax an item although the date was wrongly given and might allow the error to be corrected if he finds that he can do so without injustice to the client. The principles that I have stated dispose of the first two items. The first is, "3*s.* 4*d.* for attending and drawing up order and copies." This is admittedly not chargeable at all; but the solicitor might have charged 4*s.* 6*d.* for notice of application and copies to file and service, and omitted to do so. The taxing master, to quote his own words, "has left the 3*s.* 4*d.* item, which is not strictly chargeable, to cover the work done in respect of the above named." In other words, he has disallowed the item as charged and has altered the bill by substituting another item. In my opinion, he cannot do this, and the summons succeeds in respect of this 3*s.* 4*d.*

The second item is an error in casting. The bill delivered is for 7*l.* 14*s.* 6*d.*, but the items amount only to 6*l.* 14*s.* 6*d.* The taxing master has corrected the casting, and I am of opinion that he was right in so doing. This is not taxation, but arithmetic, and the client was as competent to add up a row of figures as the solicitor. It is objected that the order mentions 7*l.* 14*s.* 6*d.* as the amount of the bill to be taxed, but this is only for the purpose of identifying the bill. If necessary, I should have no difficulty in amending the order under the slip order.

The last item is 5*l.*, the deposit paid under r. 147 of the Bankruptcy Rules, 1886. It was contended, on the authority of *In re Buckwell & Berkeley* (1) and *In re Kingdon & Wilson* (2), that this sum ought to have been included in the solicitors' cash account and not in the bill of costs. The taxing master disallowed the objection, and there was a dispute before me on the question whether he had stated that it was the settled practice to insert such deposit in the bill of costs, although this is not the reason given for his decision. I accordingly reserved my judgment in order that I might communicate with the senior taxing

(1) [1902] 2 Ch. 596. (2) [1902] 2 Ch. 242.

FARWELL J.
1905
GRANT, BULCRAIG & Co., *In re*,

master, because, in matters of this sort where no principle of justice is involved, I should be slow to disturb the settled practice, even although such practice should appear inconsistent with decisions in cases that appear analogous. The taxing master informs me, after inquiry amongst his brother taxing masters, that there is no settled practice in the Chancery Taxing Office, but he refers me to r. 112 (1.) of the Bankruptcy Rules and the scale of costs thereunder, and I find in the latter (set out in Williams on Bankruptcy, 6th ed. p. 563) the following: "Attending official receiver with deposit, 6*s.* 8*d.* The amount of deposit is to be charged in the petitioning creditor's bill of costs." I hold, therefore, that this 5*l.* was rightly inserted in the bill of costs, and that the client's objection thereto fails. The result is that the applicant succeeds on the 3*s.* 4*d.* and fails on the 1*l.* and 5*l.*—i.e., he succeeds on one and fails in two of his three objections. I accordingly give him one-third and order him to pay two-thirds of the costs of this application. In other words, there will be a set-off of the costs, and he will pay the solicitors one-third of the costs of this application.

Solicitors: *Coburn & Co.; Grant, Bulcraig & Co.*

H. L. F.

BUCKLEY J.
1905
Nov. 3.

In re STANLEY. TENNANT *v.* STANLEY.

[1905 S. 2683.]

Will—Construction—Power to Invest in Stocks and Securities of Companies—Companies not registered in the United Kingdom.

A testator empowered the trustees of his will to invest moneys in (amongst other things) the "stocks, funds and securities (not payable to bearer) of any corporation or company, municipal, commercial or otherwise":—

Held, that the clause was not confined to the stocks, funds and securities of corporations and companies formed or registered in the United Kingdom.

The meaning of the word "company" explained.

Sir Henry Morton Stanley, G.C.B., M.P., by his will dated November 29, 1899, after making certain specific and pecuniary gifts, devised and bequeathed his residuary real and personal estate and effects to trustees upon trusts for sale and conversion and out of the net income, during the joint lives of his wife and his adopted son, Denzil Morton Stanley, to retain certain annual sums, and subject thereto to pay the net income to the testator's wife for life for her separate use without power of anticipation, and after her death to hold the trust premises, as to one half for the adopted son if he should attain the age of twenty-one years, and as to the other half in trust for such person or persons and for such purposes as the testator's wife should (subject to a proviso thereinafter contained) by deed appoint, and in default of and subject to any such appointment, in trust for D. M. Stanley if he should attain the age of twenty-one years.

Clause 15 of the will was as follows: "I declare that my trustees may at their discretion invest any moneys liable to be invested under the provisions of this my will in their names in or upon any of the parliamentary stocks or public funds or in Government securities of Great Britain or India or any British colony or dependency or any foreign country or State, or upon freehold, copyhold, leasehold or chattel real securities in Great

BUCKLEY J. 1905 STANLEY, *In re.* TENNANT *v.* STANLEY.

Britain, but not in Ireland (such leasehold and chattel real securities to be upon hereditaments held for a term of which not less than fifty years shall be unexpired at the date of investment), or on life interests in real or personal property, together with a policy or policies on the life on which the property is held, or in the capital stock of the Bank of England, or *in the stocks, funds and securities (not payable to bearer)* of *any corporation or company, municipal, commercial or otherwise,* or in any annuity, whether permanent or terminable, and whether now existing or hereafter to be created, the payment of which is charged on the revenues of India, or in any other mode of investment for the time being authorized by English law for the investment of trust funds, and may at the like discretion vary or transpose any such investments (including the investments for the time being constituting the appropriated funds) into or for others of any nature hereby authorized."

The testator died on May 10, 1904, and an originating summons (to which Lady Stanley, his widow, and D. M. Stanley were defendants) was taken out by the trustees for the determination of the question whether upon the true construction of the will the power given by clause 15 enabled the trustees to invest the trust moneys in the stocks, funds or securities (not payable to bearer) of (*a*) any corporation or company formed or registered in the United Kingdom, but carrying on business abroad, and (*b*) any corporation or company formed or registered outside the United Kingdom.

Northcote, for the trustees, stated the facts and the questions arising on them.

R. J. Parker, for the tenant for life. There can be no doubt that the words include companies registered here although they carry on business abroad.

On the other point it is contended that the words include corporations and companies formed outside the United Kingdom.

There are only three kinds of corporations known to the law of England, viz., those established by royal charter, statutory corporations, and corporations by prescription. The testator's words are not to be so confined as to include only

those three kinds of corporations. Corporation is not the only word used: some meaning must be given to the word "company," and it is submitted that the words are wide enough to include municipal corporations and commercial or business-carrying-on companies abroad, although they are not corporations within the meaning of the English law. The word "company" in s. 161 of the Companies Act, 1862, has been held to include a company registered in France: *Ex parte Fox.* (1)

W. Ernest Hollams, for the infant. The investment clause does not include the stocks, funds or securities of corporations or companies formed or registered abroad. Where a testatrix directed money to be invested in "any of the public funds, or in Government or real or leasehold securities, or upon the stocks, shares or securities of any railway or other public company," Byrne J. held that "public company" meant a public company in the United Kingdom only: *In re Castlehow.* (2) As pointed out in that case, apart from the information of experts, the Court has no knowledge of its own as to the constitution of foreign companies.

The context of the will is against the inclusion of stocks of foreign companies.

[He also referred to *Edwards* v. *Thompson.* (3)]

R. J. Parker, in reply.

Buckley J. No reason has been suggested by any counsel in the argument of the case, and no reason occurs to me, why a corporation or company formed or registered in the United Kingdom should not be within the words "any corporation or company, municipal, commercial or otherwise," merely because it carries on its business abroad. In my judgment the clause in question extends to the class referred to in part (*a*) of the summons, namely, to any corporation or company formed or registered in the United Kingdom, but carrying on business abroad. But there is more difficulty in answering the question whether the clause extends to the class referred to in part (*b*) of the summons, that is, to any corporation or company formed or

(1) (1871) L. R. 6 Ch. 176. (2) [1903] 1 Ch. 352.
(3) (1868) 38 L. J. (Ch.) 65.

BUCKLEY J. 1905 STANLEY, *In re.* TENNANT *v.* STANLEY.

registered outside the United Kingdom. The words "any corporation" if found without a context might possibly—I do not say they would—mean a corporation which is such according to our law. But the words are "any corporation or company." The word "company" has no strictly technical meaning. It involves, I think, two ideas—namely, first that the association is of persons so numerous as not to be aptly described as a firm; and secondly, that the consent of all the other members is not required to the transfer of a member's interest. It may, but in my opinion here it does not, include an incorporated company. The words "corporation or company" here mean, I think, an incorporated body or an unincorporated body which is "municipal, commercial or otherwise," and which is of such a kind as not to be what is commonly called "a firm." The power is to invest "in the stocks, funds and securities (not payable to bearer) of any corporation or company, municipal, commercial or otherwise." If I were meaning to speak of the New York Central Railway Company of America or the Canadian-Pacific Railway Company, and wished to describe it by some one single noun substantive, what word could I use other than "company"? I could not say "firm"; I must speak of it as a "company." If I were to give to the words in the will the restricted meaning which I am asked to give by counsel on behalf of the infant, I should have to say that debenture stock of a great Canadian railway or the ordinary or preference stock of an American railway was not stock of a "company commercial or otherwise." It seems to me that all such undertakings are within the meaning of the words. The phrase "municipal, commercial or otherwise" must not be strained too far, but it does, I think, include any corporation or company of that kind.

It has been pressed upon me in argument that if the entire will is read, the words "any corporation or company" may mean only such as are English. I do not think there is any context in the will which is sufficient to control the words in that sense. I think I ought to give their full meaning to the words "any corporation or company, municipal, commercial or otherwise"; and I hold, therefore, that the trustees are at liberty to invest in the stocks, funds and securities (not payable to bearer) of any

corporation or company, notwithstanding the fact that it is not formed or registered in the United Kingdom.

Solicitors for all parties: *Trower, Still, Freeling & Parkin.*

F. E.

In re DERBYSHIRE. WEBB *v.* DERBYSHIRE.

[1905 D. 1028.]

Wills — Construction — Gift of "Monies owing to me at the Time of my Decease"—Sums on Deposit at Banks.

Moneys on deposit at a testator's bank, whether notice of withdrawal is or is not required in respect of the same, will pass under a bequest of "monies owing to me at the time of my decease."

WILLIAM SHIRLEY DERBYSHIRE, a weighing-machine maker, made a will dated November 30, 1883 (whereby he appointed certain persons as executors, but did not name any persons as trustees), which, so far as material, was as follows: "I give devise and bequeath all my estate and effects whatsoever, whether real or personal, in possession, reversion, remainder, or expectancy. Upon trust for the following purposes, namely, to collect and get in all monies owing to me at the time of my decease, and after payment of my just debts and funeral expenses to pay the proceeds in equal parts to my dear wife Dorothy, my son Samuel Derbyshire . . . . my daughter Ann Jane Webb, wife of David Webb . . . . and my son William Shirley Derbyshire the younger . . . . and to pay the income, profits, interest or rents that may accrue from time to time in similar equal fourth parts. And after the decease of my said wife her share is to be divided into three equal parts between my said children Samuel Derbyshire, Ann Jane Webb and William Shirley Derbyshire the younger: And if any of my children do not survive my dear wife then the share of such child to go to his or her issue."

The testator died on April 18, 1903, leaving his wife Dorothy and his son Samuel him surviving.

BUCKLEY J.
1905
DERBYSHIRE, *In re.* WEBB *v.* DERBYSHIRE.

Ann Jane Webb died in December, 1898, leaving four children.

W. S. Derbyshire, the son, died on September 15, 1900, leaving four children and a widow.

Samuel Derbyshire had a son called Samuel Gabriel Derbyshire.

The testator was entitled at the time of his death to real and leasehold property, a sum of 3975*l.* on deposit at the Charing Cross Bank (requiring seven days' notice of withdrawal), a sum of 567*l.* 18*s.* 11*d.* on deposit at the Birkbeck Bank, and payable on demand, a sum of about 300*l.* cash in his house, and shares in certain banks and building societies.

On November 11, 1905, on the hearing of an originating summons taken out by David Webb, his Lordship decided, amongst other things, that the testator did not die intestate as to any of his property; that the "monies owing" to him went to his widow and three children absolutely; that the gift over on the widow's death applied only to property other than the "monies owing." The question was then argued as to what was included in the expression "all monies owing to me at the time of my decease."

MacSwinney, for the plaintiff. Both of the sums on deposit at the banks were "monies owing" to the testator at the time of his decease. The authorities were discussed in *Mayne* v. *Mayne*. (1)

In *Carr* v. *Carr* (2) Sir William Grant M.R. held that a balance at a bank passed under a gift of debts "due" to the testator at the time of his death, and pointed out "that when money is paid into a banker's he always opens a debtor and creditor account with the payor."

The House of Lords has decided that from the moment the money is paid into the bank the relation between the banker and the customer is that of debtor and creditor: *Foley* v. *Hill*. (3)

It can scarcely be doubted that the deposit at the Birkbeck Bank is money owing, and the fact that notice is required in the case of the deposit at the Charing Cross Bank does not prevent

(1) [1897] 1 I. R. 324. (2) (1811) 1 Mer. 541, n.
(3) (1848) 2 H. L. C. 28.

that money from being owing. The debt is like a mortgage debt payable at a future time.

Other cases as to gifts including bank balances are *Vaisey* v. *Reynolds* (1), where a bank balance was held to pass under a bequest of "monies in hand" and *Parker* v. *Marchant* (2), where it was held that bank balances would pass under a gift of "ready money," but the decision in *Carr* v. *Carr* (3) was there approved. And in *Byrom* v. *Brandreth* (4) it was held that a gift of "any money of which I may die possessed" included money at the bankers.

But the two classes of cases are not mutually exclusive, and under some circumstances money may be owing and be also ready money.

J. E. C. Adams, for the testator's widow and the widow of W. S. Derbyshire, the son, in support of the same contention, cited *Petty* v. *Willson* (5) and *Bide* v. *Harrison*. (6)

W. Higgins, for Samuel Derbyshire and Samuel Gabriel Derbyshire. The moneys on deposit do not pass as "monies owing." The expression at the outside only includes debts which are immediately payable: *Dawes' Case* (7), *In re European Life Assurance Society*. (8)

P. M. Walters, for a child of W. S. Derbyshire, the son, and a child of Ann Jane Webb. The deposits at the banks are not within the gift of "monies owing." There is no necessity to shew the meaning of the words, for here there is in effect a gift of the residue. The testator is described in the will as a weighing-machine maker, and he meant by the expression "monies owing" to pass only his trade debts.

There is a difference between income-producing and non-income-producing debts, and the former do not pass under such a gift as this.

The decision in *Parker* v. *Marchant* (2) and *Carr* v. *Carr* (3) both related to accounts current, not to moneys on deposit. *Vaisey* v. *Reynolds* (1) is inconsistent with *Carr* v. *Carr*. (3)

(1) (1828) 5 Russ. 12.
(2) (1843) 1 Ph. 356.
(3) 1 Mer. 541, n.
(4) (1873) L. R. 16 Eq. 475.
(5) (1869) L. R. 4 Ch. 574.
(6) (1873) L. R. 17 Eq. 76.
(7) (1868) L. R. 6 Eq. 232.
(8) (1869) L. R 9 Eq. 122.

BUCKLEY J. 1905 DERBYSHIRE, *In re.* WEBB *v.* DERBYSHIRE.

It has been held that moneys on deposit in respect of which a withdrawal notice is required will not pass under a bequest of "ready money" or of "pecuniary investments": *In re Price.* (1) [He also referred to *Manning* v. *Purcell* (2) and *Stein* v. *Ritherdon.* (3)]

H. C. Seddon, for other parties.

BUCKLEY J. This testator, at the time of his death, had a sum of 3975*l.* on deposit at the Charing Cross Bank, payable on seven days' notice, and a sum of 567*l.* 18*s.* 11*d.* on deposit at the Birkbeck Bank, payable on demand.

By his will he gave all his real and personal property to trustees upon trust "to collect and get in all monies owing to me at the time of my decease and after payment of my just debts and funeral expenses to pay the proceeds in equal parts to" his wife and three children, and to pay the income, profits, interest, or rents that might accrue from time to time in similar fourth parts, and directed that after the decease of his wife her share was to be divided into three equal parts between the same three children, and that if any of his children should not survive his wife the share of such child was to go to his or her issue.

It has been contended that I ought to draw the inference that the term "monies owing to me" is to be construed as being used by way of contrast with moneys producing income and as not including moneys on deposit and bearing interest, but I do not think that I should be justified in so doing.

It was decided by the House of Lords in *Foley* v. *Hill* (4) that the relation between a banker and a customer who pays money into the bank is by the contract between them that of debtor and creditor, and that that relation exists prior to the moment when the customer draws a cheque on the bank. In *Parker* v. *Marchant* (5) I find the Lord Chancellor saying this: "Sir William Grant, after some hesitation, was of opinion that the balance at the banker's would pass under the description of a debt owing to the testator. He said, and I think he justly

(1) [1905] 2 Ch. 55.
(2) (1855) 7 D. M. & G. 55.
(3) (1868) 37 L. J. (Ch.) 369.
(4) 2 H. L. C. 28.
(5) 1 Ph. 356, 361.

said, it is a debt, and may be recovered as a debt; and five or six years afterwards, in the decision of *Devaynes* v. *Noble* (1), he held the same language, upon the same principle—that the balance at the banker's is a debt due to the party who deposits the money. The money is not to be returned in specie; the engagement is, to be ready to pay an equal amount when called for. . . . . Sir William Grant, under these circumstances, there being a distinct disposition or bequest of debts owing to the testator, and this being in point of law a debt, and there being nothing to restrain the operation of it or to shew a contrary intention on the face of that will, decided, after some consideration, that the banker's balance would pass under the description of a debt; and nobody can question the correctness of that decision." The case in which Sir William Grant so decided was *Carr* v. *Carr*. (2) In that case the testator had given whatever debts might be due to him at the time of his death, and Sir William Grant held that the gift passed money at his bank although no cheque had been drawn on the account before his death.

There are several cases—I may mention *Mayne* v. *Mayne* (3), *In re Wheeler* (4), and *In re Price* (5)—which go to shew that where the bequest is of "ready money" money on deposit with a testator's bankers will pass where notice of withdrawal is not required, but will not pass where notice of withdrawal is required, and on the authority of these cases it has been argued before me that the money on deposit at the Birkbeck Bank, in respect of which notice of withdrawal is not required, will not pass as money owing because it is ready money. But the terms "ready money" and "money owing" are not mutually exclusive, and it seems to me that money may be both ready money and money owing. I think that the money at the Birkbeck Bank passes under the words.

As to the money at the Charing Cross Bank, in respect of which notice of withdrawal is required, the relevant considerations seem to be these: If in the case of moneys standing to the

(1) (1816) 1 Mer. 529.
(2) 1 Mer. 541, n.
(3) [1897] 1 I. R. 324.
(4) [1904] 2 Ch. 66.
(5) [1905] 2 Ch. 55.

BUCKLEY J. 1905 DERBYSHIRE, *In re.* WEBB *v.* DERBYSHIRE.

credit of current account with a banker, the relation of debtor and creditor exists though no demand for payment has been made, moneys on deposit payable after notice must I think be moneys owing, although notice of withdrawal is necessary and has not been given. The money on current account and the money on deposit at notice are alike moneys due but not payable. I think that the money at the Charing Cross Bank passed by the words.

In *Petty* v. *Willson* (1), Selwyn L.J. said: "It would be making a fanciful distinction to say that this money, which clearly forms part of the testator's estate, was not owing to the testator, because it could not, in any event, be paid to himself, but must be received by his representatives. The case in this respect differs but little from that of money owing to the testator on a promissory note and payable on a day which did not arrive till after his decease." And in the same case Giffard L.J. said: "It would be much too refined to say that this money was not due and owing to him, because it was payable not to him but to his executors."

It would be distinguishing where there was no real difference if I drew any distinction between deposits where notice of withdrawal was and deposits where notice was not required.

I hold that both sums are "monies owing" within the meaning of the will.

Solicitors for all parties except Samuel Derbyshire and Samuel G. Derbyshire: *Hilder, Thompson & Dunn.*

Solicitors for S. Derbyshire and S. G. Derbyshire: *E. J. Bridgman.*

(1) L. R. 4 Ch. 574, 575.

F. E.

In re CALGARY AND EDMONTON LAND COMPANY.

BUCKLEY J.

1905

Dec. 12, 19.

[00147 of 1905.]

Company—Reduction of Capital—Paying off Capital in Excess of Company's Wants—Procedure—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 15—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

Where the Court is asked to confirm a reduction of a company's capital which is to be effected by paying off capital in excess of the wants of the company, and the Court upon hearing the petition is satisfied that the reduction ought to be confirmed, the proper procedure is to make the order confirming the reduction and then allow the further hearing of the petition to stand over until evidence has been produced that the capital to be paid off has actually been returned to the shareholders, and when this has been done to post-date the order confirming the reduction and approving a minute shewing with respect to the capital, as altered by the order, the particulars required by s. 15 o the Companies Act, 1867, and s. 4 of the Companies Act, 1877.

The Court cannot make the order approving the minute stating the reduced capital until the capital has in fact been reduced by the repayment.

It is sufficient if the minute states the result of what has been done without shewing how that result has been brought about.

Form of minute.

Observations as to the form of minute where the capital is returned on the footing of its being subject to be recalled.

The capital of the company in this case consisted of shares of 1*l.* each, fully paid. The company having passed a special resolution for reduction of its capital by returning to the shareholders the sum of 2*s.* 6*d.* per share, representing capital which was in excess of the wants of the company, a petition was presented to the Court praying for confirmation of the reduction.

The petition came on for hearing on December 12, 1905.

Younger, K.C., and *Bischoff*, in support of the petition, asked the Court to make an order forthwith confirming the reduction and approving a form of minute to be registered in accordance with s. 15 of the Companies Act, 1867.

[Buckley J. In more than one case recently I have declined to make the final order confirming a reduction of capital by

BUCKLEY J.
1905
CALGARY AND EDMONTON LAND COMPANY, *In re.*

returning capital to shareholders which was in excess of the company's wants, and approving the minute until I have been satisfied that the money has actually been paid to the shareholders. After that has been done the order is drawn up and is post-dated. I believe that practice was more than once approved by Chitty J.]

The practice referred to has been recently followed by your Lordship, but it is not the practice invariably followed. In many cases difficulties might result from it—for instance, if a shareholder could not be found, or refused to take his money. It is submitted that the order ought to be made "confirming the reduction," as required by s. 11 of the Act of 1867, and that, until that is done, and the requirements of s. 15 of the Act have been complied with, the money ought not to be returned. The capital will then have been reduced, and what is paid over will not be capital, but money in the nature of a debt owing by the company to the shareholder.

[BUCKLEY J. Sect. 3 of the Companies Act, 1877, authorizes "capital" to be returned. How can the Court approve a minute stating that the capital is the reduced sum until it has been reduced to that sum by making the return to the shareholders?]

[Reference was also made to the form of minute in *In re Fore Street Warehouse Co.*, in Palmer's Company Precedents, Pt. i. 8th ed. p. 1150, and to *In re Artisans' Land and Mortgage Corporation.* (1)]

Cur. adv. vult.

Dec. 19. BUCKLEY J. The Companies Act, 1867, by s. 11 empowers the Court to make an order confirming a reduction of capital, and by s. 15 provides that "the registrar of joint stock companies upon the production to him of an order confirming the reduction . . . . and the delivery to him of a copy of the order and of a minute (approved by the Court), shewing with respect to the capital of the company, as altered by the order, the amount of such capital," and so on, "shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect." Then, by the same section

(1) [1904] 1 Ch. 796.

the registrar is to certify the registration of the order and minute, "and his certificate shall be conclusive evidence that," amongst other things, "the capital of the company is such as is stated in the minute."

The Companies Act, 1877, by s. 3 added a power to reduce capital by paying off "any capital which may be in excess of the wants of the company," and by s. 4 provided that "the minute required to be registered in the case of reduction of capital shall shew, in addition to the other particulars required by law, the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share."

The petition now before me asks for an order confirming a reduction of capital by reducing shares of 20*s.* each, fully paid, to shares of 17*s.* 6*d.* each, fully paid, by returning to the shareholders 2*s.* 6*d.* per share. The question, for the purpose of answering which I adjourned the petition until to-day, is whether I can properly make that order finally, and approve a minute to the effect that the capital consists of shares of 17*s.* 6*d.* each, fully paid, when the 2*s.* 6*d.* per share has not yet been repaid, and the capital is therefore at the date of the order not that which is stated in the minute. In my judgment I cannot do so. I was anxious to search with a view to seeing whether I could trace in the course of my own experience at the Bar a case—for if my recollection is to be trusted I have had numbers of such cases—in which the practice followed was this: first to make an order confirming the reduction, then to allow the further hearing of the petition to stand over in order that an affidavit might be supplied shewing that the repayment had been made, and then to post-date the order, referring therein to the affidavit and approving a minute stating what would then be the truth. On my books being searched many references have been found to orders confirming reductions of capital, but it is not easy to trace those in which the reduction confirmed was by returning capital. I did find one reference to such an order, but although I have obtained a copy of the order, it throws no light on the question. I have not thought it desirable to delay the matter in order to make a further search.

These minutes are matters to which the Court is bound to give

BUCKLEY J.
1905
CALGARY AND EDMONTON LAND COMPANY, *In re.*

very careful attention, having regard to the provision in s. 15 of the Act of 1867, that the registrar's certificate is to be conclusive evidence "that the capital of the company is such as is stated in the minute." The resolution in the present case is right in stating the reduction, and that it is to be effected by returning half-a-crown a share, and by reducing the nominal amount of all the shares from 1*l.* to 17*s.* 6*d.* a share. And the proposed minute that the reduction has been effected by returning to the holders of the shares 2*s.* 6*d.* a share, and by reducing the nominal amount of all the shares from 1*l.* to 17*s.* 6*d.* a share, will be right as soon as the half-crown has been returned; but until that payment has been made the proposed minute is not true.

But then it is said that I ought to treat the matter in this way: "Never mind that the half-crown has not been returned; the share capital of the company after the order has been made will be only 17*s.* 6*d.* a share, paid on the reduced share of 17*s.* 6*d.*, and the other half-crown will not be capital at all, but a debt owing by the company to the shareholder." That argument seems to me to result in this difficulty, that if the half-crown is not capital then it is not that which you are authorized to return under s. 3 of the Act of 1877, viz., "capital which" is "in excess of the wants of the company." The half-crown, as it seems to me, is capital which, after the proper steps mentioned in the Acts have been taken, may be returned, but until it has been returned it is capital. It has been subscribed as capital, and it is, in the hands of the company, moneys of the corporation representing moneys subscribed by the corporators in respect of a liability of half-a-crown upon each of their shares. Until that has ceased to be the fact a minute stating that the capital is a smaller sum cannot, I think, be properly approved.

Orders have in some cases been made confirming reductions of capital by returning capital upon the footing that the amount returned or any part thereof may be called up again. That case was considered by Kay J. some years ago, and he thought that such an order was right, and Chitty J. subsequently made similar orders. Suppose this were a case of returning half-a-crown per share subject to recall. The appropriate form of

minute to be approved by the Court within s. 15 of the Companies Act, 1867, and s. 4 of the Companies Act, 1877, would be a minute stating that the share was a share of 1*l.* upon which 17*s.* 6*d.* was "at the date of the registration of the minute proposed to be deemed to have been paid up." But if the half-crown had not been returned, that would not be correct. The amount paid up would be a larger sum.

It seems to me that to complete the matter in cases of return of capital you must, before you can get the minute in proper form, make the return of the money. It was pointed out in argument that difficulties may occur where some shareholder cannot be found, or where some shareholder is obstinate and will not take his money. If any such difficulty were to arise, it could always be met by paying the money to a separate account, or something of that kind, but until payment is in some way made I do not see how I can approve a minute which will proceed upon the footing that it has been made. There should be an affidavit that the money has been returned, and then I will approve the minute.

Younger, K.C. I am instructed that the money will be returned to-night, and when that is done the minute proposed for the Court's approval will be not that suggested in the petition, but a minute as follows: "The capital of the Calgary and Edmonton Land Company, Limited, is henceforth 211,321*l.* 5*s.* divided into 241,510 shares of 17*s.* 6*d.* each, instead of the original capital of 241,510*l.* shares of 1*l.* each. At the time of the registration of this minute the sum of 17*s.* 6*d.* has been and is to be deemed to be paid up on each of the said shares."

BUCKLEY J. Yes, instead of stating how the reduction has been effected, the minute may state the result after it has been effected. The affidavit may be produced to the registrar of the Court, and the order including the approval of the minute post-dated.

Solicitors: *Bischoff, Dodgson, Coxe, Bompas & Bischoff.*

F. E.

SWINFEN EADY J.

1905

Dec. 9.

In re POLLOCK.
POLLOCK *v.* POLLOCK.

[1905 P. 2442.]

Settled Land—Tenant for Life—Will—Gift to Widow during Widowhood for the Maintenance of herself and her Children—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7; *s.* 58, *sub-s.* 1 (*vi.*).

A testator gave all his real and personal estate to trustees upon trust, as to a certain piece of land and a public-house for his wife during widowhood, for the benefit and maintenance of herself and her children and the proper bringing up of the latter:—

Held, that the widow had the powers of a tenant for life under s. 58, sub-s. 1 (vi.), of the Settled Land Act, 1882, notwithstanding that her interest was charged with the maintenance of the children: *In re Theaker's Settled Estates* (Wolstenholme's Conveyancing and Settled Lands Acts, 9th ed. p. 332) followed.

William Pollock, the testator in this matter, by his will dated March 30, 1886, appointed his wife and his eldest son trustees and executors, and devised and bequeathed all his real and personal estate to his trustees, upon trust, "as to and concerning all that piece of copyhold land, with the licensed public-house called the Crow's Nest, and the freehold piece of land (converted by me into a bowling green) at the back or north side of the said public-house and premises, for my dear wife during her widowhood, for the benefit and maintenance of herself and our dear children and the proper bringing up of the latter; and from and after the decease or second marriage of my said wife, whichever shall first happen, then in trust for such of our children as may be then living, and the children of those (if any) who may have died meanwhile (the latter to take only what would have been their parents' share if living when this present trust arises)."

The testator died on August 10, 1886, leaving his wife and six children surviving, who were then all infants. The will was proved by the widow alone. The eldest son attained twenty-one in 1891, and from that time acted as trustee, but he never proved the will.

The widow carried on the public-house personally until May 1, 1901, when she desired to give it up, and it was leased by the trustees for five years to a brewer.

The testator's youngest child attained twenty-one in October, 1905. This summons was taken out in the Liverpool District Registry in November, 1905, by the testator's eldest son, for the determination of the question, among others, whether the widow was alone the tenant for life of the land settled by the will, or whether the widow and children together constituted such tenant for life. The defendants were the widow and children and grandchildren.

Stuart Deacon, for the plaintiff.

W. H. Cochran, for the widow. The widow is beneficially entitled to the whole income subject to a charge for the maintenance of such of the children as require it; she is therefore a tenant for life within s. 2, sub-ss. 5 and 7, of the Settled Land Act. (1) If she is not within that section she has the powers of a tenant for life under s. 58, sub-s. 1 (vi.). North J. in *In re Booth* (2) held that a similar clause in a will created a charge in favour of such of the children as required maintenance. The widow is therefore in the same position as the tenant for life of an incumbered estate, whose powers are preserved by s. 2, sub-s. 7. In *In re Theaker's Settled Estates* (mentioned in

(1) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2:—

Sub-s. 5: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

Sub-s. 7: "A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent."

Sect. 58, sub-s. 1: "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

"(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition, over. . . ."

(2) [1894] 2 Ch. 282.

SWINFEN EADY J.
1905
POLLOCK, *In re.*
POLLOCK *v.* POLLOCK.

Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 332) it was held that under a similar clause the widow had the powers of a tenant for life under s. 58, sub-s. 1 (vi.).

W. D. Rotch, for other defendants, did not oppose.

SWINFEN EADY J. I will follow *In re Theaker's Settled Estates*, and declare that the widow has the powers of a tenant for life under s. 58, sub-s. 1 (vi.), of the Settled Land Act, 1882.

Solicitors: *Radcliffe-Smith & Co., Liverpool.*

J. R. B.

SWINFEN EADY J.
1905
Nov. 30; *Dec.* 1, 2, 4, 5, 6, 21.

BOSCHOEK PROPRIETARY COMPANY, LIMITED *v.* FUKE.

[1905 B. 1553.]

Company—Directors—Qualification—Shares held "in his own Right"—Shares held as Liquidator of another Company—Income Tax on Directors' Fees—General Meeting convened by de facto Directors—Validity of Resolutions—Ratification of Acts contrary to Articles—No Alteration of Articles—Special Business—Notice.

The qualification of a director being the holding of 250 shares in his own right, F. was registered as "F. liquidator of the H. company" with a holding of 500 shares:—

Held, that he was not qualified to be a director.

Bainbridge v. *Smith*, (1889) 41 Ch. D. 462, 474, and *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502, applied.

Apart from special provision in the articles directors are not entitled to their fees free of income tax.

The resolutions of a general meeting convened by de facto directors are not invalidated by any irregularity in the constitution of the board.

Browne v. *La Trinidad*, (1887) 37 Ch. D. 1; *Grant* v. *United Kingdom Switchback Rys. Co.*, (1888) 40 Ch. D. 135; *British Asbestos Co.* v. *Boyd*, [1903] 2 Ch. 439, and *Southern Counties Deposit Bank* v. *Rider*, (1895) 73 L. T. 374, applied.

In re Haycraft Gold Reduction and Mining Co., [1900] 2 Ch. 230, and *In re Estate of Wyoming Syndicate*, [1901] 2 Ch. 431, distinguished.

Articles fixing the qualification and remuneration of directors being binding on the company as well as the directors, the company cannot ratify an act of the directors in contravention of such articles without first altering them by special resolution.

Imperial Hydropathic Hotel Co., Blackpool v. *Hampson*, (1882) 23 Ch. D. 1, applied.

Irvine v. *Union Bank of Australia*, (1877) 2 App. Cas. 366, distinguished.

The notice convening a general meeting stated that it would be held for the purpose of receiving the directors' report, and the election of directors and auditors. The directors' report sent therewith mentioned certain special business not referred to in the notice, viz., the ratification of the board's previous election of R. as a director:—

Held, that the notice and report together were sufficient notice of this special business.

Irvine v. *Union Bank of Australia*, 2 App. Cas. 366, 375, applied.

WITNESS ACTION.

This was an action to recover moneys alleged to have been misapplied by Francis George Fuke and Cuthbert Oliver Rigby, the late directors of the plaintiff company.

The plaintiff company was incorporated on November 20, 1895, with a capital of 360,000*l.*, divided into 360,000 shares of 1*l.* each, for the purpose of acquiring and working certain mines on the Bosch Hoek estate, in South Africa. Of these shares 300,000 were issued as fully paid to the vendors, the Heidelburg Estates and Exploration Company, Limited. The remaining 60,000 shares other than the seven shares agreed to be taken by the signatories were unissued. The company had no cash capital, but in or previous to 1899 it borrowed 17,500*l.* from the Heidelburg Company on debentures to that amount.

The articles provided that—

5. No person should be recognized by the company as holding any share upon any trust, and the company should not be bound by or recognize any equitable contingent, future, or partial interest in any share, or any interest in any fractional part of a share, or (except as thereinafter provided) any other right in respect of any share, except an absolute right to the entirety thereof in the registered holder.

27. The survivor or survivors of a deceased joint holder of shares, and the executors or administrators of a deceased sole holder, should be the only persons recognized by the company as having any title to their or his shares.

28. Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, might be registered as a member upon signing a proper instrument whereby he should agree to take and hold such share, subject to all conditions affecting the same.

SWINFEN EADY J.
1905
BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

41. The directors might, whenever they thought fit, convene an extraordinary general meeting.

44. Seven days' notice at least, specifying the place, day, and hour of meeting, and in case of special business the general nature of such business, should be given to the members, but the accidental omission to give such notice to, or the non-receipt of such notice by any member, should not invalidate any resolution passed or proceedings had at any general meeting.

45. All business should be deemed special that was transacted at an extraordinary meeting, and any that was transacted at an ordinary meeting should be so considered, with the exception of the consideration of the accounts, the balance-sheet, and the report of the directors, the declaring of a dividend, and the election or appointment and remuneration of directors and auditors, or other officers.

64. The number of directors should not be less than four.

65. The first directors should be appointed by a written instrument, signed by any five or more of the subscribers to the memorandum of association.

66. The qualification of every director so appointed should be the holding in his own right of at least 250 fully-paid shares. A director might act before acquiring his qualification, but should, if he accepted office, be bound to acquire the same within one month after his appointment or election.

72. Every director should vacate his office on ceasing to hold his qualifying number of shares.

75. Any occasional vacancy in the office of director might be filled up by the board by the appointment of a qualified member.

76. The continuing directors might act, notwithstanding any vacancies in their body, provided that the number of continuing directors should never be less than four, but one director might act for the purpose of filling up vacancies on the board.

77. The directors should be entitled to receive by way of annual remuneration a maximum sum of 500*l.*, and also a sum equal to 10 per cent. of the annual profits of the company remaining after 10 per cent. upon the capital of the company, paid up, or credited as paid up, for the time being, had been

earned, whether distributed or not, such remuneration to be divisible as the board might determine. If in the opinion of the board it was desirable that any of its number should make any special journeys, or perform any special services on behalf of the company or its business, such director or directors should be paid such reasonable additional remuneration and expenses for the same as the board or the company might from time to time determine.

79. The directors might delegate any of their powers, other than the power of making calls, to committees consisting of such member or members of their body as they thought fit.

81. Until otherwise determined, two directors should be a quorum.

84. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, should, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director.

87. The directors might appoint a manager or managers, secretary or secretaries, solicitor or solicitors, and such other officers, clerks and servants, permanent, local, special, or temporary, as and upon such terms and conditions as they might deem expedient or necessary.

91. No director or other officer should be liable for any other director or officer, or for joining in any receipt or other act for conformity.

On April 24, 1896, the defendant Fuke was appointed secretary at 100*l.* a year. He held this office up to March 25, 1903.

On February 15, 1898, the directors resolved that their 500*l.* remuneration should be divided as follows, viz., 200*l.* per annum to the chairman, and 100*l.* per annum to each of the remaining directors. There were then four directors. This resolution was never altered.

On February 27, 1900, the Heidelburg Company went into voluntary liquidation and Fuke was appointed liquidator.

At that date the Heidelburg Company held 275,500 shares and

SWINFEN EADY J.
1905
BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

17,500*l.* debentures of the plaintiff company. It had also a claim against certain shareholders of the plaintiff company in respect of which the liquidator recovered 500 shares.

On August 23, 1901, these 500 shares were transferred to Francis George Fuke, "Liquidator of the Heidelburg Estates and Exploration Company, Limited, 167, Winchester House, Old Broad Street, London," and on September 6, 1901, they were registered under that name and description.

The number of directors was not kept up to four, and on October 9, 1901, only two directors were left, viz., Frost and Polkinghorne.

On December 4, 1901, these two directors purported to hold a board meeting and to pass the following resolution :—

"That Mr. Francis George Fuke be and he is hereby appointed managing director of the company at a remuneration of 700*l.* per annum for a period of two years and to be at liberty to retain his position as secretary of the company at a salary of 100*l.* per annum, provided that the said Francis George Fuke draws only at the rate of 200*l.* per annum as managing director until the working capital of the company of 60,000*l.* or part thereof has been subscribed."

At this date Fuke had only ten shares of his own in addition to those which he held as liquidator.

No part of the 60,000*l.* was in fact subscribed, but Fuke drew or credited himself with the whole salary. The debenture interest was in arrear, and all that was left of the 17,500*l.* was a sum of 950*l.* on deposit and 100*l.* on current account. There was in fact nothing to manage except to endeavour to procure working capital.

The plaintiff company impeached this resolution on the ground that there was no competent board, that there was no power to appoint a managing director, that Fuke was not qualified, and that the remuneration exceeded the maximum of 500*l.*

On August 19, 1902, Polkinghorne died, and on January 28, 1903, Frost ceased to be a director, having transferred his qualification shares.

On February 2, 1903, Fuke, who claimed to be sole director, purported to hold a board meeting and passed transfers of 250 shares to himself, 250 to Hughes, and 250 to the defendant Rigby.

The transfers were registered on February 5, 1903. These shares were of course sufficient qualification, but Fuke was not subsequently appointed a director.

On February 3, 1903, Fuke purported to hold a board meeting and appointed Hughes and Rigby directors.

On February 5, 1903, the three directors held a board meeting, and "it being stated that it is usual for the tax on managing directors' fees to be paid by the companies, it was resolved that the sum of 8*l.* 4*s.* 3*d.* income tax on the managing director's fees be paid out of the funds of the company."

On February 9, 1903, at a board meeting similarly attended, cheques for the tax on Polkinghorne's, Frost's and Fuke's fees were drawn.

This transaction was also impeached by the plaintiff company on the ground that it was ultra vires.

Questions having subsequently arisen as to the validity of the past acts of the directors, counsel's opinion was taken, and it was determined to alter some of the articles.

On May 14, 1903, a board meeting was held, and the secretary was instructed to convene a general meeting on May 25 for the purpose of passing the following resolutions, viz.:—

(1.) A resolution altering art. 64 by providing that the number of directors should not be less than two, with a corresponding alteration in art. 76.

(2.) A resolution empowering the board to appoint one of their body as managing director, and to fix his remuneration.

(3.) A resolution that all the acts theretofore done by any persons purporting to act as directors of the company should, if such acts would have been binding on the company if done by a duly constituted board, be binding on the company.

(4.) A resolution ratifying and confirming the board's resolution of December 4, 1901.

Notice was duly given of the proposed resolutions, stating that if the first two resolutions were passed by the requisite majority they would be submitted for confirmation as special resolutions to a further extraordinary general meeting which would be subsequently convened.

The general meeting was held on May 25, and the resolutions

SWINFEN EADY J.
1905
BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

were passed unanimously. The first two resolutions were duly confirmed at an extraordinary general meeting of June 11, 1903.

The plaintiff company impeached these resolutions on the ground that there was no board competent to summon the meeting, and it impeached the third and fourth resolutions on the ground that they could only be passed after the articles had been altered by special resolution.

On June 23, 1903, Hughes resigned.

On July 31, 1903, notice was given that the ordinary general meeting would be held on August 10, 1903, for the purpose of receiving the directors' report and accounts to June 30, 1903, and the election of directors and auditors. The directors' report sent with the notice stated (inter alia)—

"Directors,—You will be asked to ratify the election of Mr. C. O. Rigby as a director, also to elect a new director."

On August 10, 1903, the ordinary general meeting was held, and it was unanimously resolved "that the election of Mr. C. O. Rigby as a director of the company on February 3, 1903, be and the said election is hereby ratified."

Rigby relied on this resolution as ratifying his appointment as from February 3, 1903, and claimed that he was entitled to at least two years' salary at 100*l.* from that date up to his resignation on March 13, 1905. He had in fact received 190*l.* 10*s.* 8*d.* for salary up to December 31, 1904.

The plaintiff company, however, contended that the notice of the resolution in that behalf was insufficient, and that Rigby's appointment only dated from August 10, 1903, so that he had not served two complete years at the date of his resignation, and was therefore only entitled to one year's salary.

In January, 1905, the Heidelburg Company was reconstructed under a scheme by which the new company was in effect to finance and manage the plaintiff company. As part of the scheme it advanced 2000*l.* to the plaintiff company for the discharge of its liabilities (other than debentures and interest).

On March 10, 1905, a large portion of this amount was applied by Fuke and Rigby in part payment of the undrawn balance of Fuke's remuneration, and was accepted by him in full discharge.

Certain resolutions passed at general meetings on January 12, 28, and February 25, 1905, were relied on as sanctioning or ratifying this payment, the only substantial payment really impeached in the action, but the Court held on the evidence that the matter had never been fairly or properly placed before the shareholders, so that there was no sufficient ratification with knowledge of the facts.

On March 13, 1905, in pursuance of the same scheme, Fuke and Rigby appointed certain directors of the new Heidelburg Company directors of the plaintiff company and resigned their seats on the board.

The writ was issued on April 18, 1905.

Eve, K.C., and *Felix Cassel*, for the plaintiff company. The board resolution of December 4, 1901, was bad on five grounds. First. There was no competent board under arts. 64 and 76. Secondly. There was no power to appoint a managing director. Thirdly. Fuke was not qualified under art. 66, as he did not hold 250 shares in his own right, i.e., in such a way that the plaintiff company could deal with him as absolute owner: *Bainbridge* v. *Smith* (1); *Sutton* v. *English and Colonial Produce Co.* (2) Fourthly. The remuneration exceeded the 500*l.* maximum prescribed by art. 77. Fifthly. The offices of director and secretary were incompatible: *Iron Ship Coating Co.* v. *Blunt* (3); *Rex* v. *Tizzard.* (4)

The ratification of Fuke's appointment at the extraordinary general meeting of May 25, 1903, was bad on two grounds First. There was no board competent to convene the meeting: *In re Haycraft Gold Reduction and Mining Co.* (5); *In re State of Wyoming Syndicate.* (6) Secondly. The general meeting could not pass a resolution inconsistent with arts. 66 and 77 (qualification and remuneration) without first altering those articles: *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (7); *Harben* v. *Phillips.* (8)

Fuke's claim to 700*l.* a year was in any case bad, as the

(1) 41 Ch. D. 462, 474.
(2) [1902] 2 Ch. 502.
(3) (1868) L. R. 3 C. P. 484, 489.
(4) (1829) 9 B. & C. 418.
(5) [1900] 2 Ch. 230.
(6) [1901] 2 Ch. 431.
(7) 23 Ch. D. 1, 8, 11, 13.
(8) (1883) 23 Ch. D. 14, 39.

SWINFEN EADY J.
1905
BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

condition precedent to his drawing that amount was not fulfilled: *Caridad Copper Mining Co.* v. *Swallow.* (1)

The payment of income tax on directors' fees was clearly ultra vires in the absence of any express provision in the articles. Again, Rigby's appointment on February 3, 1903, was bad, as Fuke was not really a director, and the ratification at the ordinary general meeting of August 10, 1903, was bad as such, as the notice of this meeting did not refer to this special business, as required by art. 44. This defect was not cured by the reference in the directors' report. Rigby was no doubt appointed a director at this meeting, but not retrospectively. Having, therefore, only served for a year and a fraction of a year, he was only entitled to one year's salary: *Salton* v. *New Beeston Cycle Co.* (2)

Micklem, K.C., and *Hon. Frank Russell*, for Fuke. Assuming that Fuke's appointment on December 4, 1901, was ultra vires the board, it was not ultra vires the company, and it was effectually ratified at the extraordinary general meeting of May 25, 1903. This meeting was convened by the de facto directors, and the irregularity in the constitution of the board did not vitiate the ratification: *Browne* v. *La Trinidad* (3); *Grant* v. *United Kingdom Switchback Rys. Co.* (4); *British Asbestos Co.* v. *Boyd* (5); *Southern Counties Deposit Bank* v. *Rider.* (6)

In *In re Haycraft Gold Reduction and Mining Co.* (7) and *In re State of Wyoming Syndicate* (8) the secretary convened the meeting without any authority from the de facto or de jure directors.

[SWINFEN EADY J. Could the company ratify Fuke's appointment without first altering art. 66 (qualification) and art. 77 (remuneration)?]

No alteration of the articles was necessary. First. Having regard to the very wide terms of art. 5, which goes far beyond the form in Palmer's Company Precedents, 8th ed. part 1, p. 555, the company was bound to disregard Fuke's description as

(1) [1902] 2 K. B. 44.
(2) [1899] 1 Ch. 775.
(3) 37 Ch. D. 1.
(4) 40 Ch. D. 135.
(5) [1903] 2 Ch. 439.
(6) 73 L. T. 374.
(7) [1900] 2 Ch. 230.
(8) [1901] 2 Ch. 431.

liquidator, and to deal with him as absolute owner. That was sufficient qualification for art. 66: *Bainbridge* v. *Smith* (1); *Sutton* v. *English and Colonial Produce Co.* (2) Secondly. The appointment may be justified as the appointment of a manager under art. 87, or a delegation to a committee of one under art. 79, and the remuneration can be justified as additional remuneration for special services under art. 77. In any case the company could ratify a past act of the directors although contrary to the articles: *Irvine* v. *Union Bank of Australia.* (3) The payment of income tax on directors' fees was no doubt ultra vires.

Gore-Browne, K.C., and *Austen-Cartmell*, for Rigby. First. Fuke was qualified on December 4, 1901. He did not hold the shares in a representative capacity as executor or trustee in bankruptcy under art. 28. He held them simply as trustee for the Heidelburg Company, and the plaintiff company being debarred by art. 5 and s. 30 of the Companies Act, 1862 (25 & 26 Vict. c. 89), from paying any attention to the improper entry of this trust on the register was bound to deal with Fuke as absolute owner: *Société Générale de Paris* v. *Walker.* (4) This is sufficient qualification under art. 66, and beneficial interest is unnecessary: *Bainbridge* v. *Smith.* (1) If necessary the register could have been rectified retrospectively: *In re Sussex Brick Co.* (5) In *Sutton* v. *English and Colonial Produce Co.* (2) the director's trustee in bankruptcy was claiming the shares, so that there was a transmission of interest, and the company could not deal with the director as absolute owner. As a matter of fact art. 66 only requires a qualification for the directors first appointed. Secondly. The office of managing director is not an office known to the law, though the expression is convenient. The appointment of December 4, 1901, was good under art. 76, so far as it appointed Fuke a director, but as the board was not properly constituted it could not have appointed him manager under art. 87, or delegated the management to him under art. 79, or given him additional remuneration for special services under art. 77. But these ultra vires additions did not invalidate his

(1) 41 Ch. D. 462, 474.
(2) [1902] 2 Ch. 502.
(3) 2 App. Cas. 366.
(4) (1885) 11 App. Cas. 20, 30.
(5) [1904] 1 Ch. 598.

SWINFEN EADY J. 1905 BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

appointment as director. Fuke therefore being or believing himself to be a director, the appointment of Hughes and Rigby was valid under art. 84 and s. 67 of the Companies Act, 1862, and for the same reason these three de facto directors could summon a general meeting under art. 41: *Dawson* v. *African Consolidated Land and Trading Co.* (1) It cannot be contended that the company was to come to a deadlock, and that no general meeting could be summoned unless there were four directors.

At all events the resolutions passed at the general meeting of May 25, 1903, were not vitiated by any irregularity in the constitution of the board which summoned it: *Browne* v. *La Trinidad* (2); *Grant* v. *United Kingdom Switchback Rys. Co.* (3); *British Asbestos Co.* v. *Boyd* (4); *Southern Counties Deposit Bank* v. *Rider.* (5) In any case the plaintiff company had notice of what had been done, and was bound by acquiescence in the past act, although it was contrary to the articles: *Phosphate of Lime Co.* v. *Green* (6), approved in *Ho Tung* v. *Man On Insurance Co.* (7) The suggestion of Montague Smith J. in *Iron Ship Coating Co.* v. *Blunt* (8), to the effect that the offices of secretary and director are incompatible, is only a dictum.

Rigby at all events thought Fuke's appointment was duly ratified and concurred in the payments on that footing. This was at most a bona fide mistake of fact, and he is exonerated by art. 91, and by the general law: *Dovey* v. *Cory.* (9) Rigby's own appointment, if not initially good, was effectually ratified at the general meeting of August 10, 1903. The notice convening this meeting, coupled with the directors' report, was sufficient notice of this special business within art. 44: *Irvine* v. *Union Bank of Australia.* (10) Rigby was therefore entitled to two years' salary from February 3, 1903. Supposing, however, he is to be treated as only having served one complete year, he was entitled to any share of the 500*l.* available under art. 77 that the directors liked to give him, and he has received less than 200*l.*

(1) [1898] 1 Ch. 6.
(2) 37 Ch. D. 1.
(3) 40 Ch. D. 135.
(4) [1903] 2 Ch. 439.
(5) 73 L. T. 374.
(6) (1871) L. R. 7 C. P. 43.
(7) [1902] A. C. 232.
(8) L. R. 3 C. P. 484, 489.
(9) [1901] A. C. 477.
(10) 2 App. Cas. 366, 375.

Eve, K.C., in reply. Art. 84 and s. 67 of the Companies Act, 1862, are inapplicable, as Hughes and Rigby knew of the defect in Fuke's appointment and in the constitution of their board: *Harben* v. *Phillips*. (1) It is clear that Rigby knew or he would not have wanted his own appointment ratified. Secondly. If art. 66 is read with arts. 72 and 75, it is clear that all directors must be qualified. Thirdly. There was no competent board to give Fuke additional remuneration for special services under art. 77, or to determine the time of payment: *Caridad Copper Mining Co.* v. *Swallow* (2), and in any case this power was not exercised. Fourthly. The fact that the three so called directors could not validly summon the general meeting of May 25, 1903, involved no deadlock, as five members could have summoned it under s. 52 of the Companies Act, 1862: *In re Brick and Stone Co.* (3)

Cur. adv. vult.

Dec. 21. SWINFEN EADY J. [After stating the facts up to and including the resolution of December 4, 1901, appointing Fuke managing director at a remuneration of 700*l.* per annum, continued:—] This resolution was, in my opinion, invalid. By art. 64 the number of directors should not be less than four. By art. 77 the directors were to be entitled to receive by way of annual remuneration a *maximum* sum of 500*l.* with a percentage of profits (if any), such remuneration to be divisible as the board might determine. The articles did not contain any provision enabling the board to appoint any managing director. Under these circumstances it was quite beyond the powers of the two remaining directors to appoint a third person (even if qualified to be a director) to be managing director of the company at a salary of 700*l.* a year.

The question, however, has been raised as to whether Fuke was qualified to be appointed a director. By art. 75 any occasional vacancy in the office of director may at all times be filled up by the board by the appointment of a qualified member. By art. 66 the qualification of a director is the holding in his

(1) 23 Ch. D. 14, 28. (2) [1902] 2 K. B. 44.
(3) [1878] W. N. 140.

SWINFEN EADY J.
1905
BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

own right of at least 250 shares, and by art. 72 every director shall vacate his office on ceasing to hold his qualifying number of shares. It was contended that art. 66 only required a qualification in the case of the first directors appointed by the subscribers to the memorandum, but, having regard to arts. 72 and 75, this contention is not in my opinion well founded. Then was Fuke "a qualified member"? The 500 shares which are claimed as a qualification were entered in the company's register as follows: "Francis George Fuke, liquidator of the Heidelburg Estates and Exploration Company, Limited, 167, Winchester House, Old Broad Street, London." Did Fuke hold these shares "in his own right"?

In *Bainbridge* v. *Smith* (1) Lindley L.J. pointed out that the phrase "holding shares in his own right" had acquired a conventional meaning, and added, "I think that conventional meaning is this, that a person 'holding shares in his own right' means holding in his own right as distinguished from holding in the right of somebody else. . . . . It means that a person shall hold shares in such a way that the company can safely deal with him in respect of his shares whatever his interest may be in the shares."

I therefore ask myself these two questions—First, Did Fuke hold in his own right, as distinguished from holding in the right of somebody else; and secondly, Could the plaintiff company have safely dealt with him in respect of these shares, whatever his interest in the shares might be?

In my opinion the first question should be answered in the negative. Fuke held the shares in right of the Heidelburg Estates and Exploration Company, Limited, and not in his own right. Suppose he had been described on the register of the company as "F. G. Fuke, trustee of A. B., a bankrupt," or as "F. G. Fuke, executor of C. D., deceased," in neither case would he have held shares in his own right, but in the former case in right of the bankrupt, and in the latter in right of the testator. So in the present case the description of him on the register as "liquidator of the Heidelburg Estates and Exploration Company, Limited," shews that he held the shares in right of that

(1) 41 Ch. D. 462, 474.

company, and in his capacity of liquidator of that company. If, on the other hand, he had been registered as "F. G. Fuke, of &c., accountant," he would have held the shares in his own right within the meaning of the decisions, although he might in fact have been trustee of a bankrupt, or executor of a deceased person or liquidator of a company. In the present case I am not considering whether it is usual or proper for a shareholder to be put upon the register with the description "trustee of A. B., a bankrupt," or "executor of C. D., deceased," or "liquidator of the X. Company." I am only considering what is the effect of such a registration.

I am also of opinion that the second question, previously mentioned, should be answered in the negative. The plaintiff company could not safely deal with Fuke in respect of the 500 shares, whatever his interest might be in the shares, as it had notice that he held them as liquidator of the Heidelburg Company. Suppose the plaintiff company had taken them as a security for an overdue debt owing by Fuke personally, could the company have pleaded that it took them in good faith, and without notice that they belonged to the Heidelburg Company, of which Fuke was liquidator? Certainly not; the plaintiff company's own register shews that it was as liquidator of the Heidelburg Company that the shares stood in Fuke's name. In like manner, if the shares had been registered "F. G. Fuke, executor of C. D., deceased," the plaintiff company could not have taken them by way of security from F. G. Fuke for a private debt of his own, and then successfully contended that it had no notice that Fuke was only entitled to the shares as executor of a deceased person. If, on the other hand, the shares had been registered simply "F. G. Fuke, of &c., accountant," then the plaintiff company could have safely dealt with Fuke on the footing that he held the shares in his own right, even though in point of fact he might have held them as executor of a deceased person or liquidator of a company. See also *Sutton* v. *English and Colonial Produce Co.* (1) I decide, therefore, that the 500 shares were not a qualification for Fuke within the meaning of the articles.

[His Lordship then stated the facts as to Fuke's appointment

(1) [1902] 2 Ch. 502.

SWINFEN EADY J.

1905

BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

of Hughes and Rigby as co-directors with himself, and continued :—]

The first act of the board so constituted is thus recorded in the minutes—"February 5, 1903. Present: F. G. Fuke, managing director, in the chair, T. Hughes, C. O. Rigby. It being stated that it is usual for the tax on managing directors' fees to be paid by the companies, it was resolved that the sum of 8*l.* 4*s.* 3*d.*, income tax on the managing director's fees, be paid out of the funds of the company." Another board, similarly attended, was held on February 9, 1903, when the only business was drawing cheques for income tax on the fees of three directors—Fuke received 8*l.* 4*s.* 3*d.* This transaction was, in my opinion, quite unjustifiable. Even if the board had been duly constituted, it would have had no right whatever to take out of the company's moneys the sums which each director ought to pay out of his own money for any income tax properly payable by him. The defendants are jointly and severally liable for this misapplication of the moneys of the company, and must repay the amount with interest.

I now proceed to consider the alleged confirmations by the company in general meeting of Fuke's position and salary. Questions were raised as to the validity of the past acts of the directors; the opinion of counsel was taken, certain alterations of the articles were recommended, and on May 14, 1903, at a board meeting, the secretary was instructed to convene a general meeting of the company for May 25, 1903. The plaintiff company has objected to the validity of any resolutions passed at this meeting on two grounds. The first ground is that there was no duly constituted board which could validly convene a general meeting of the company. This meeting was called by the only persons acting as directors, and the persons who for upwards of three months had been acting as the board; the resolution for calling it was passed at a board meeting; notice of it was duly sent to every shareholder, and one of the objects of the meeting was to confirm the acts theretofore done by persons purporting to act as directors. Under these circumstances, I must consider any informality in convening the meeting as a mere irregularity, and not sufficient to invalidate any resolution passed at it. The case

is governed by *Browne* v. *La Trinidad* (1), *Southern Counties Deposit Bank* v. *Rider* (2), and *British Asbestos Co.* v. *Boyd* (3), rather than by *In re Haycraft Gold Reduction and Mining Co.* (4) and *In re State of Wyoming Syndicate.* (5) In the two latter cases the secretary had convened the meeting in question without any authority from a board meeting of directors or persons acting as such.

The second ground on which the plaintiff company has objected to the validity of the third and fourth resolutions passed at this meeting is that they could only have been properly passed after the articles had been altered by special resolution. The company in general meeting could not appoint, and could not ratify, as from December, 1901, the appointment of Fuke as managing director at 700*l.* per annum as he had not the necessary qualification, and the maximum remuneration of the whole board was fixed by the articles at 500*l.* The articles, until altered, bound the shareholders in general meeting as much as the board. The present case is unlike that of *Irvine* v. *Union Bank of Australia* (6), to which reference was made, as in that case the limitation of the power of borrowing and mortgaging was merely a limitation of the authority of the directors, and not a limitation of the general powers of the company. It was argued that the acts of the directors in excess of their authority might be ratified by the company and rendered binding, and that contention succeeded. Articles must first be altered by special resolution before the altered articles can be acted upon: *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson.* (7)

It was urged that there was power under art. 77, if in the opinion of the board it was desirable that any of its number should perform any special services, to pay him additional remuneration, but there was no duly constituted board to form any such opinion, and that is a condition precedent (see *Caridad Copper Mining Co.* v. *Swallow* (8)); moreover, no special services are referred to either in the board minutes or the minutes of the

(1) 37 Ch. D. 1.
(2) 73 L. T. 374.
(3) [1903] 2 Ch. 439.
(4) [1900] 2 Ch. 230.
(5) [1901] 2 Ch. 431.
(6) 2 App. Cas. 366, 374.
(7) 23 Ch. D. 1.
(8) [1902] 2 K. B. 44.

SWINFEN EADY J.

1905

BOSCHOEK PROPRIETARY COMPANY, LIMITED v. FUKE.

general meeting, and the company did not purport to exercise this power in any way.

It was further urged on behalf of Mr. Rigby that he ought not to be under any liability in this matter as he was acting in good faith under the advice of counsel, but when the opinion is looked at it is clear that counsel advised that all the resolutions, and not merely the first and second, should be passed as special resolutions; and, moreover, the payment really impeached in this action was made long afterwards, during the present year, and after the question as to it had been raised.

[His Lordship, after dealing with the alleged ratification of 1905, and holding that the question of Fuke's remuneration had never been fairly or properly placed before the shareholders so that there was no sufficient ratification with knowledge of the facts, and after holding that Fuke and Rigby were liable for the payment, continued :—]

The remaining claim is as to Rigby's remuneration. It is alleged that he only served as director one complete year, for which he was only entitled to 100*l.*, but nevertheless has been paid 10*l.* and 180*l.* 10*s.* 8*d.*, making together 190*l.* 10*s.* 8*d.* The argument that Rigby had not served two complete years was based on the contention that his election or appointment by Fuke on February 3, 1903, had not been duly ratified or confirmed by the company in general meeting on August 10, 1903, because sufficient notice had not been given that the matter would be dealt with at that meeting. The report of the directors is dated July 31, 1903, and was sent out with the notice convening the ordinary general meeting for August 10, 1903. The report contains this paragraph: "Directors,—You will be asked to ratify the election of Mr. C. O. Rigby, as a director; also to elect a new director," and the notice convening the meeting states that the meeting will be held for the purpose of receiving the directors' report, and accounts, to June 30, 1903, and the election of directors and auditors. In my opinion this was sufficient notice to the shareholders of the intention to bring before the meeting the ratification of Mr. Rigby's election. See *Irvine* v. *Union Bank of Australia* (1), where Sir Barnes Peacock

(1) 2 App. Cas. 366, 375.

said that their Lordships "are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting." In my opinion this report and notice given amounted to sufficient notice of the business which was intended to be brought forward at the meeting—namely, to ratify the election of Mr. Rigby. The result, therefore, is that this claim fails. The defendants must pay the costs of the action except so far as increased by the claim for alleged excess of remuneration paid to Rigby; the plaintiff company must pay the costs of the action so far as increased by this claim, with the usual set-off.

Solicitors: *Mayo, Elder & Co.; Charles Robert Woolley.*

G. R. A.

WRIGLEY *v.* GILL.

[1900 W. 2789.]

Mortgagor and Mortgagee—Redemption Action—Accounts—Compound Interest—Proviso for Capitalization of Interest in Arrear—Mortgagee in Possession—Receipt of Rents available for Payment of Interest.

A mortgage of leaseholds contained a proviso that, if and so often as any interest due under the mortgagor's covenant should be in arrear for twenty-one days after the day appointed for the payment thereof, that interest should be treated as an accession to the capital secured by the deed as on the day on which the same ought to have been paid, and should thenceforth bear interest at the rate and on the days provided by the deed.

The mortgagee entered into possession of the property and received the rents.

On the taking of the accounts in a redemption action:—

Held, that, if on the expiration of twenty-one days after any interest became due, the mortgagor not having paid the interest, there was in the hands of the mortgagee, after deducting ground rent and other proper outgoings, an amount arising from the rents received by him sufficient for the payment of the interest, though it had not been

C. A. 1905 WRIGLEY v. GILL.

actually appropriated to that purpose, the interest could not be said, within the meaning of the proviso, to be in arrear, and the mortgagee was therefore not entitled to have it capitalized.

Decision of Warrington J., [1905] 1 Ch. 241, affirmed.

Union Bank of London v. *Ingram*, (1880) 16 Ch. D. 53, and *Bright* v. *Campbell*, (1889) 41 Ch. D. 388, distinguished.

Dictum of Cotton L.J. in *Cockburn* v. *Edwards*, (1881) 18 Ch. D. 463, preferred to that of Jessel M.R. in the same case, 18 Ch. D. 456.

APPEAL by the defendants from part of the order of Warrington J. on the further consideration of the action. (1) In that report the facts are fully stated, and it appears sufficient now to give the following summary.

The action was by a mortgagor for the redemption of the mortgaged property, which was leasehold. The original defendant was Ann Gill, who was second mortgagee for 200*l.* under a deed dated March 13, 1893. She having died, her executors were added as defendants.

By that deed the mortgagor covenanted with the mortgagee to pay interest at the rate of 6 per cent. per annum, and there was the following proviso: "Provided also, and it is hereby agreed that, if and so often as any interest due under the covenant hereinbefore contained, or this present provision, shall be in arrear for twenty-one days after the day hereby appointed for payment thereof, such interest shall be treated as an accession to the capital moneys hereby secured, as on the day on which the same ought to have been paid, and shall thenceforth bear interest payable at the rate and on the days aforesaid, and this security shall extend to such capitalized interest in all respects."

On May 29, 1894, the second mortgagee entered into possession of the property, and on September 11, 1894, she took a transfer of the prior mortgage, which was dated October 22, 1887. This was a mortgage to a building society, and at the date of the transfer there was owing upon that security, and two further charges, 1299*l.* 8*s.* 1*d.* for principal, subscriptions, fines, and interest. This amount was treated as owing on the taking of the accounts. The action was commenced on September 20, 1900.

By the judgment at the trial on July 30, 1901, the following accounts were (inter alia) directed:—(1.) An account of what

(1) [1905] 1 Ch. 241.

was due to the defendants under or by virtue of the securities. (2.) "An account of all sums of money properly laid out by the defendants on necessary repairs and lasting improvements on the hereditaments comprised in the said mortgage, and further charges and transfer, with interest on the sums which shall appear to have been so laid out, computed after the rate of 6*l.* per cent. per annum." [This direction is stated more fully than in the former report in order to explain the terms of that part of the order on further consideration which was appealed from.] (3.) An account of the rents and profits received by the defendants, or which without the wilful default of the defendants might have been received, "without prejudice to any question upon further consideration as to rests," with the usual direction that what should appear due under this account should be deducted from what should appear due under accounts 1 and 2.

By his certificate dated July 29, 1904, the master certified (inter alia):—

"There is due to the defendants from the plaintiff, under and by virtue of the indenture dated March 13, 1893, the sum of 200*l.* for principal, and the sum of 158*l.* 13*s.* 1*d.* for compound interest thereon at the rate of 6*l.* per cent. per annum from March 13, 1894, to the date of this certificate."

"266*l.* 5*s.* 3*d.* is the total of all sums of money laid out by the defendants in necessary repairs and lasting improvements on the hereditaments comprised in the said mortgage and further charges and transfer down to February 1, 1904, and 124*l.* 3*s.* 9*d.* is the amount of interest on the sums which have been so laid out down to July 29, 1904 (the date of this certificate), such interest having been computed after the rate of 6*l.* per cent. per annum, such sums of 266*l.* 5*s.* 3*d.* and 124*l.* 3*s.* 9*d.* making together the sum of 390*l.* 9*s.* 0*d.*"

On the further consideration of the action and on a summons to vary the certificate Warrington J. held that the mortgagee was not entitled to compound interest as he claimed under the above proviso in the mortgage of March 13, 1893, on the ground that, at any rate in some half-years, the interest had not been in arrear for twenty-one days within the meaning of that proviso, because, though the mortgagor had not himself paid the interest,

C. A. 1905 WRIGLEY v. GILL.

yet the mortgagee had had in her hands an amount of rents available for the payment of the interest, though it had not actually been appropriated to that purpose.

The part of the order appealed from was the following declaration:—

"The Court doth declare that the defendants are only entitled to simple interest at the rate of 6 per cent. per annum on the principal sum of 200*l.*, secured by the indenture of mortgage dated March 13, 1893, except that if the rents in the hands of the defendants or any of them were (after deducting the amount of any outgoings except costs properly chargeable against such rents during the half-year hereinafter mentioned, and the interest on the mortgage dated October 22, 1887, and the further charges dated October 8, 1890, and July 4, 1892, and the indenture of transfer dated September 11, 1894, and interest on the sums expended in repairs accrued for the half-yearly day hereinafter mentioned), neither on any half-yearly day on which, under the said mortgage dated March 13, 1893, interest was payable, nor at any time in the course of twenty-one days subquent to such half-yearly day, equal to or in excess of the amount payable in respect of such half-year's interest under the mortgage dated March 13, 1893, then the amount by which such rents were less than the amount of such half-yearly interest ought to be treated as an accession to the principal sum of 200*l.*, and carry interest at the rate of 6 per cent. per annum." (1)

The defendants appealed.

Rowden, K.C., and *Austen-Cartmell*, for the defendants. Compound interest ought to be allowed under the proviso that when interest is in arrear for twenty-one days, it shall be capitalized. This interest had not been paid. It is true that the mortgagee being in possession had received the rents and profits, but that is not payment of the interest. Although there is no decision

(1) The judgments in the Court of Appeal proceeded on the assumption that the mortgagee's duty to appropriate the rents in hand to the payment of interest arose only when the available amount of rent was not less than the interest due. The terms of the declaration as here set out were not brought before or approved by their Lordships. See the last paragraph of Vaughan Williams L.J.'s judgment.—F. P.

on a clause exactly like the present, the point is really covered by *Union Bank of London* v. *Ingram* (1), *Cockburn* v. *Edwards* (2), and *Bright* v. *Campbell*. (3) There is nothing to shew that the mortgagee in any way appropriated the rents and profits to payment of interest, and she cannot be forced to appropriate them or to account for them till the accounts are finally taken. Rents and profits received by a mortgagee in possession are applicable to discharge what is due on the security generally—the capital and the interest, and the cost of necessary repairs. It will in fact be found that in some years the mortgagee expended for repairs and improvements more than the rents received by her. At various times she was out of pocket, though ultimately in the result she may have received more than she laid out, and there may have been enough to cover the interest.

[THE COURT intimated that the direction for the allowance of interest on the sums expended by the mortgagee on necessary repairs and lasting improvements was very unusual. It must have been inserted either by consent or by a slip.]

The order appealed from in effect requires that the account shall be taken with half-yearly rests. This is contrary to the practice. And, as Warrington J. said in the present case, and as Joyce J. said in *Ainsworth* v. *Wilding* (4), a mortgagee is not obliged to accept payment in driblets.

Peterson, for the plaintiff. It is submitted that the interest was not in arrear for twenty-one days within the meaning of the proviso. The object of that proviso was that the mortgagee should not be kept out of his interest, and that if it was not paid he should be placed in the same position as if it had been paid. By entering into possession the mortgagee deprived the mortgagor of one means of paying the interest. A mortgagee in possession is entitled to use the rents which he receives in any way he pleases, subject to his liability to account for them. He is not bound to account for any profit which he may have derived from the use of the rents which he has received. It cannot be truly said that the interest was in arrear when the mortgagee had in her hands moneys which could be applied in paying it. In the

(1) 16 Ch. D. 53.
(2) 18 Ch. D. 449.
(3) 41 Ch. D. 388.
(4) [1905] 1 Ch. 435.

C. A. 1905 WRIGLEY v. GILL.

cases upon which reliance is placed for the mortgagee there was a provision for the benefit of the mortgagor, and the onus was on him to shew that he had brought himself within the words—that he had paid the interest punctually. In *Cockburn* v. *Edwards* (1) the point which now arises was not decided. But there is a dictum of Jessel M.R. one way, and a dictum of Cotton L.J. the other way. There is no decision of the Court of Appeal which governs the present case, and it is submitted that the dictum of Cotton L.J. is the sounder one.

Rowden, K.C., in reply. The practice is, as Warrington J. said (2), to take the account of rents and profits received by a mortgagee in possession continuously from beginning to end, without reference to whether he has at any particular time had in his hands more than sufficient to pay the interest or not. The order appealed from is, it is submitted, inconsistent with that practice.

VAUGHAN WILLIAMS L.J. This is an appeal from part of the order made by Warrington J. on the further consideration of the action, which was brought by a mortgagor for redemption of the mortgaged property. The effect of that order is that the mortgagor is relieved from the burden of capitalization of interest, except in certain cases. The question for decision depends upon the meaning of the proviso contained in the mortgage deed of March 13, 1893, and we have to consider whether on the facts it has been shewn that the interest has been in arrear for twenty-one days after the days respectively appointed for payment. It has not been suggested that the mortgagor in fact made any payment of the interest as such, but it is said that, although he did not in fact make any payment of interest as such, yet that if the mortgagee had in her hands rents which, after deducting the ground rent and other proper outgoings, left in her hands a sum sufficient for the payment of the interest, then it cannot be said that, within the meaning of the above proviso, the interest was in arrear. Now, no doubt, on the authorities cited to us it cannot be said that the matter is covered by any actual decision. But there are expressions made use of by Jessel M.R. in *Cockburn* v

(1) 18 Ch. D. 449. (2) [1905] 1 Ch. 253.

Edwards (1), which shew, I think, most clearly that in his view the fact that the mortgagee has in his hands rents which after making all proper deductions would be available for the payment of the interest would not of itself be sufficient to prevent the interest from being in arrear. The question in that case was whether a power of sale by the mortgagee had arisen, and that depended upon the question whether the interest had been three months in arrear. Jessel M.R. said (2): "But was there any interest in arrear? It has been argued that a mortgagee in possession, if he receives rent to an amount more than sufficient to pay the interest, must be taken to have been paid his interest. I cannot accede to that argument. A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest; but till an account is taken there is no set-off, there is no appropriation of the rents. This is still clearer if you take the case of a horse. The mortgagee lets it out for hire, he has to pay the expenses of its keep, and you cannot treat his receipts as appropriated to anything till an account is rendered."

The learned judge then referred to *Brocklehurst* v. *Jessop* (3), and expressed his disapproval of a dictum of Shadwell V.-C. in that case to the effect that the receipt of rents by an equitable mortgagee in possession "ought, primâ facie, to be taken as payment either of the principal or interest of his debt, as the case may be"; and the Master of the Rolls went on to say, "the receipt of rents by the mortgagee is not a payment by the mortgagor, or by anyone on his behalf. The mortgagee receives rents which are his own, subject, of course, to the right of redemption." The decision of *Cockburn* v. *Edwards* (1) did not essentially turn upon this point; for all the learned judges agreed that in that particular case the accounts shewed that there had been such an appropriation of the rents in the hands of the mortgagee that it amounted to a discharge of the interest, so that it was impossible for the mortgagee to say that the interest had been in arrear for the three months on which the power of sale arose. But Jessel M.R. did intimate very

(1) 18 Ch. D. 449. (2) Ibid. 456, 457.
(3) (1835) 7 Sim. 438, 442.

C. A. 1905 WRIGLEY v. GILL. Vaughan Williams L.J.

plainly his view that, if it had been necessary to decide the point, the mere fact that the mortgagee had the money in his hands would not have prevented him from selling under the power —that is, in other words, that the interest would have been in arrear—that the receipt of rents by the mortgagee did not of itself amount to the payment of interest. But both Brett L.J. and Cotton L.J. dealt with the point. It is true that there is no affirmative expression of opinion by Brett L.J., yet to my mind his words suggest very strongly that this was a length to which he was not prepared to go, and I think it may be taken that he did not agree with the positive opinion of Jessel M.R. Then Cotton L.J. said (1): "Interest was in arrear unless the rent received by the mortgagee can be treated as applied in payment of interest. Now, receipt of rents by a mortgagee is not, as a general rule, equivalent to a payment by the mortgagor. If a mortgagee enters into possession, his receipt of rents is not payment of interest by the mortgagor so as to entitle the latter to the benefit of a proviso for reduction of interest on punctual payment; and I quite agree with the remarks of the Master of the Rolls as to the dictum in *Brocklehurst* v. *Jessop*. (2) If, however, a mortgagee receives rents which are all along more than sufficient for payment of interest and expenses, so that his account, if he were to render one, would shew that there was in his hands at every time a balance applicable to the reduction of the principal, I am not prepared to decide that he can merely, because there has been no actual appropriation of the rents to payment of interest, say that there is interest in arrear within the meaning of the proviso in the power of sale." It seems to me that the learned Lord Justice was saying as plainly as possible that he could not go to the same length as Jessel M.R., but that he thought the receipt by the mortgagee of rents available for the payment of the interest would preclude him from saying that the interest was in arrear. It is true that the case actually suggested by Cotton L.J. was one in which "a mortgagee receives rents which are all along more than sufficient for payment of interest and expenses," so that the mortgagee's account, "if he were to render one, would shew that there was

(1) 18 Ch. D 463. (2) 7 Sim. 438, 442.

in his hands at every time a balance applicable to the reduction of the principal"; and that is not quite the present case, because it is said that here, while in some half-years the rents may have been sufficient, in other half-years they may not have been sufficient for payment of the interest. Still, I think it is plain that Cotton L.J. did not agree with the dictum of Jessel M.R. In fact, the words which had to be construed in *Cockburn* v. *Edwards* (1)—"in arrear"—were not quite the same as those in a covenant giving a mortgagor the benefit of a reduction of the rate of interest on prompt payment. It may well be that the interest is not "in arrear," although there has not been in strictness any payment of it by the mortgagor. This has been recognized at common law in an action of replevin, where upon the issue whether rent was in arrear the tenant has been allowed to set off against rent payments made by him which ought properly to have been made by the landlord. In the present case, as in *Cockburn* v. *Edwards* (1), the question is not one of payment, but whether the interest was in arrear within the meaning of the proviso. In this conflict of opinion between judges of great authority we have to consider what is the proper conclusion in a case like the present, in which prima facie one's mind revolts somewhat against a construction which will give the mortgagee a right to interest upon interest—for that is the meaning of capitalization—when he has had in his pocket money of the mortgagor available for payment of the interest and which the mortgagee could use for that purpose if he thought fit to do so. We ought not to put such a construction upon such a proviso unless we arrive at the conclusion that this must have been the intention of the parties. This is not the case of a proviso allowing a reduction of the rate of interest to the mortgagor in case he pays the interest punctually. It is the case of a proviso which, in the event of the default of the mortgagor in paying the interest, gives the mortgagee a right to something beyond that to which he would otherwise be entitled under the mortgage deed, and in my opinion the mortgagee could not, within the meaning of this proviso, say that interest was in arrear which would cease to be in arrear the moment he chose without any further act by the mortgagor.

(1) 18 Ch. D. 449.

C. A. 1905 WRIGLEY v. GILL. Vaughan Williams L.J.

It was properly admitted by counsel that the case is one in which it is for the mortgagee to prove that the event upon which he was to obtain this advantage has happened, just as in *Union Bank of London* v. *Ingram* (1) the onus was upon the mortgagor to prove that the event had happened which entitled him to a reduction of the rate of interest. We have therefore to consider whether the interest was in arrear in the present case. In *Cockburn* v. *Edwards* (2) it was held there had been an appropriation of the rents to payment of the interest. But it seems to me that we cannot support the judgment of Warrington J. in the present case unless we are prepared to hold that under such a proviso as we have here the mortgagee will not be entitled to say that the interest is in arrear, if while he was in possession he had in his hands on the day appointed for payment of interest, or within twenty-one days afterwards, rents received by him available for the payment of the interest. In my opinion that is the right view. In such circumstances I do not think, but it is not necessary to decide it in this case, that the mortgagee, having in his hands rents available to pay the interest, would be able to relieve himself of the obligation so to apply the money by giving notice to the mortgagor that he had appropriated it to some other purpose, or that he did not appropriate it to the payment of the interest.

In my opinion the judgment of Warrington J. was right. The meaning is that if the mortgagee has in his hands such an amount of rents as, after deducting all proper outgoings, exceeds or is equal to the interest due, he is not entitled to say that the interest is in arrear. I believe that to be the meaning of the observations of Brett and Cotton L.JJ. in *Cockburn* v. *Edwards* (2), and it is that which I adopt. If, after making the proper deductions for outgoings, a mortgagee in possession has in his hands money available for the payment of the interest, it cannot, in my opinion, be properly said, on the construction of such a proviso as this, that the parties intended that the interest should be treated as "in arrear" so as to entitle the mortgagee to compound interest.

I desire to add this: The appellant's counsel suggested that

(1) 16 Ch. D. 53. (2) 18 Ch. D. 449.

this conclusion would be inconsistent with the opinion expressed by Warrington J. in the present case, and also by Joyce J. in *Ainsworth* v. *Wilding* (1), that a mortgagee is not bound to receive payment of his interest by driblets. That would be a sound observation if the amount of the rents in the hands of the mortgagee were less than that of the interest due, but in my judgment it has no application to a case in which the amount of the rents available exceeds or is equal to the amount of the interest due on the day appointed for payment, or within twenty-one days afterwards. In my opinion the decision of Warrington J. was right, and the appeal must be dismissed.

STIRLING L.J. I also am unable to differ from the judgment of Warrington J. The question for our decision is whether the mortgagee is entitled to the benefit of a proviso in the mortgage deed which entitles him to compound interest in case the interest on the mortgage debt shall be in arrear for twenty-one days after the day appointed for payment. [His Lordship read the proviso.] In order that the mortgagee may obtain the benefit of this proviso, he must shew that the event mentioned in it has happened, viz., that the interest has been in arrear for twenty-one days. The question is, has it been established that any interest was in arrear for twenty-one days? [His Lordship stated the facts, including the accounts directed by the judgment at the trial, and observed that the account No. 2 was a remarkable one and that it must have been inserted either by consent or by some slip which could not now be corrected. His Lordship continued:—] Warrington J. has held that, at any rate as regards some half-years, the mortgagee has not shewn that the interest was in arrear within the meaning of the proviso. He pointed out that the onus of proving that the interest was in arrear lies upon the mortgagee, and there is no question that he was right as to that. The learned judge then discussed three cases which had been cited to him, viz., *Union Bank of London* v. *Ingram* (2), *Bright* v. *Campbell* (3), and *Cockburn* v. *Edwards* (4), the latter of which

(1) [1905] 1 Ch. 435.
(2) 16 Ch. D. 53.
(3) 41 Ch. D. 388.
(4) 18 Ch. D. 449.

C. A. 1905 WRIGLEY v. GILL. Stirling L.J.

is the nearest to the present case; and, having regard to what was said in it by the judges of the Court of Appeal, he came to the conclusion that he was at liberty to act upon his own opinion, and to decide that the mortgagee had not shewn that interest had been in arrear so as to entitle him to compound interest. With that conclusion I agree, and mainly for the reasons given by the learned judge. *Union Bank of London* v. *Ingram* (1) was a decision by Jessel M.R. upon the construction of a proviso contained in a mortgage for the reduction of the rate of interest (which was 6 per cent.), in case the mortgagor should pay interest at 5 per cent. within forty days after the days appointed for payment. In order that he might claim the benefit of this proviso, the event which it had to be shewn by the mortgagor had happened was that he had paid the interest within the time limited. The mortgagee had entered into possession and had received the rents of the mortgaged property, and Jessel M.R. held that this did not amount to payment of the interest by the mortgagor so as to entitle him to the reduction of the rate of interest under the proviso.

That decision was followed by Kay J. in *Bright* v. *Campbell* (2), but I think with some reluctance. However, the proviso with which we have now to deal differs both in its nature and in its language. In both those cases the mortgagor was claiming the benefit given to him on his paying interest at 5 per cent. within a certain time, and it was held that he did not discharge the onus of shewing that he had done this by shewing that the mortgagee had received rents sufficient for the payment of the interest. In the present case it is the mortgagee who is claiming a benefit under a proviso upon the happening of a certain event, i.e., the interest being in arrear.

Cockburn v. *Edwards* (3) much more nearly resembles the present case than either of the other two. In that case the mortgage deed was treated as containing a power for the mortgagee to sell the mortgaged property in the event of the interest being in arrear for three months. No interest had been actually paid by the mortgagor, but the mortgagee had gone into possession

(1) 16 Ch. D. 53. (2) 41 Ch. D. 388.
(3) 18 Ch. D. 449.

C. A. 1905 WRIGLEY v. GILL. Stirling L.J

and had received the rents, and the question was discussed whether that was sufficient to prevent the power of sale arising. There was no actual decision of the point, because all the members of the Court held, on the evidence, that there had been in fact an appropriation of the rents to the payment of interest.

Jessel M.R., however, expressed a strong opinion that the receipt of rents by the mortgagee could not of itself be considered as payment so as to prevent the interest from being in arrear. But I think that, to say the least, Brett L.J. and Cotton L.J. did not concur in that view. I am fully sensible of the great weight that is due to the authority of Jessel M.R., but at the same time it appears to me that the language of Cotton L.J. expresses more accurately the rule which is applicable.

[His Lordship read the passage already quoted from the judgment of Cotton L.J., and continued:—]

I agree with the view of the Lord Justice, and wish to adopt his words as my own with regard to the present case. Here the proviso in the mortgage deed is one for the benefit of the mortgagee, and it is inserted with the view of compensating him for being kept out of his interest through non-payment by the mortgagor. He goes into possession of the property and receives the rents, and thereby deprives the mortgagor of the readiest means of paying the interest, and, as the learned judge found, he had in some half-years in his hands rents by which he might have satisfied the interest, and he does not shew that he applied those moneys in the payment of anything else under the mortgage. In these circumstances, ought he to be allowed to say that within the meaning of the proviso the interest was in arrear? In *Cockburn* v. *Edwards* (1) Cotton L.J. was not prepared to say that he could as regarded the exercise of a power of sale, and it seems to me that the same principle applies to the present case, in which the mortgagee is claiming compound interest. It was pressed upon us by the appellant's counsel that if we so decide we shall be departing from the practice of the Court that a continuous account is to be taken as between mortgagor and mortgagee without making any rests. I quite agree that that is the practice. But the answer is that the

(1) 18 Ch. D. 449, 463.

C. A. 1905 WRIGLEY v. GILL. Stirling L.J.

account will not be taken with rests. It is true that an inquiry will be made as to the state of the account each half-year, but the account will proceed continuously, though the inquiry will be made in order to see whether the proviso applies or not. I desire to say nothing as to how far the mortgagee might have appropriated the rents which he received otherwise than to the payment of interest. It is not suggested that any other appropriation was in fact made. If there were any evidence of such an appropriation I should desire to consider what the effect of it might be. I wish in particular to reserve my opinion as to the operation of the proviso in the event of an appropriation of rents by a mortgagee to the payment of the capital of the mortgage debt. As it is, I agree with the judgment of Warrington J.

COZENS-HARDY L.J. I am of the same opinion. The case is a difficult and an important one. There is no decision of the Court of Appeal which is binding upon us, though some dicta have been quoted. There are, however, two decisions of judges of first instance on the construction of a proviso for the reduction of the rate of interest upon punctual payment by the mortgagor. It was held first by Jessel M.R. in *Union Bank of London* v. *Ingram* (1), and this was really followed by Kay J. in *Bright* v. *Campbell* (2), that in such a case the receipt of rents by a mortgagee in possession could not be regarded as payment of the interest by the mortgagor so as to entitle him to claim the benefit of the reduction of the rate of interest. Assuming that those cases were rightly decided, still it seems to me that they in no way govern the present case. There is a great difference between them and the case of a proviso in favour of the mortgagee if, and if only, the interest should be in arrear. I think this distinction is very clearly pointed out by Cotton L.J. in *Cockburn* v. *Edwards* (3), viz., that the interest may not be in arrear although it has not been paid by the mortgagor. The dicta of the judges of the Court of Appeal in that case cannot be reconciled. I have great hesitation in differing from Jessel M.R., but on the

(1) 16 Ch. D. 53. (2) 41 Ch. D. 388.
(3) 18 Ch. D. 449, 463.

C. A. 1905 WRIGLEY v. GILL. Cozens-Hardy L.J.

other hand there is the dictum of Cotton L.J., which commends itself to my mind, as it does to my learned brethren. I understand Cotton L.J. to put the case on the ground of estoppel against the mortgagee, that the mortgagee cannot be allowed to say that the interest is in arrear when he has in his hands rents which might be applied to its payment. I was at one time impressed with the argument that this view really involves the taking of the account of rents and profits with rests. But on consideration I agree with my brother Stirling that this will not be the result; the account will still be taken continuously in the usual way, and the mortgagee will be entitled to simple interest at 6 per cent., unless he can make out in any half-year the existence of the facts which entitle him to compound interest.

Solicitors: *Bower, Cotton & Bower, for Longbotham & Sons, Halifax; Scott, Spalding & Bell, for William Lees, Oldham.*

W. L. C.

ASSHETON SMITH *v.* OWEN.

C. A. 1905 *July* 4, 5, 6, 7, 8, 27, 28; *Dec.* 20.

[1902 A. 1721.]

*Harbour Dues—Port—"Limits of Port"—Ships loading or unloading Goods within Limits of Port—Fiscal or Customs Port—Commercial or Local Port—Natural Port artificially enlarged — Statute — Construction — Contemporanea Expositio—*33 *Geo.* 3, *c. cxxiii.*—49 *Geo.* 3, *c. xxiv.*

By two Acts passed respectively in 1793 and 1809, the trustees of Carnarvon Harbour thereby appointed were authorized to levy specified rates or duties upon all ships loading or unloading within the limits of the port of Carnarvon, and upon goods loaded or unloaded on or from vessels within the limits of that port.

The plaintiff was the owner of a small port, called Port Dinorwic, situate on the east side of the Menai Straits, about four miles to the north of Carnarvon. Since the passing of the Act of 1809 there had been constructed by the plaintiff's predecessors in title on the plaintiff's land, further inland than the natural high-water mark at that date, docks and quays, which were connected with the sea by an artificial channel and lock, so that at high water vessels could go in to and come out from those docks and unload or load at the quays.

The fiscal port of Carnarvon extended along the Straits some way to

C. A.
1905
ASSHETON SMITH v. OWEN.

the north of Port Dinorwic, and the trustees claimed to be entitled to payment of the duties in respect of vessels loading or unloading at the plaintiff's quays. The plaintiff brought the action claiming a declaration that Port Dinorwic, including his docks and quays, was not within the limits of the port of Carnarvon, and that the trustees were not entitled to claim payment of the duties upon vessels which passed through the north end of the Straits to or from Port Dinorwic or the plaintiff's docks or quays, or any rates or duties on goods loaded or unloaded on or from vessels at Port Dinorwic or on or from the plaintiff's docks or quays.

There was evidence that the duties claimed by the trustees had been for many years and up to a short time before the commencement of the action paid by the plaintiff and his predecessors without dispute.

The evidence also satisfied the Court that those who made use of Port Dinorwic derived some benefit from the works which the trustees had executed under their statutory powers:—

Held, on the construction of the Acts, and having regard to the above facts, that the words "the limits of the port" in the Act must be taken to have been used in the sense of the limits of the fiscal port; that the plaintiff's docks and quays were within those limits; and that the trustees were entitled to payment of the duties which they claimed.

Decision of Kekewich J. affirmed.

The words "within the limits of the port" have not acquired a recognized technical meaning as denoting a customs port.

Per Stirling L.J.: The plaintiff's predecessors had by their own acts enlarged the limits of the port.

Per Cozens-Hardy L.J.: If by artificial means, such as the construction of a dock, the line of high tide is carried further inland, the limits of the fiscal port must follow that line. The limits of the fiscal port must be the present high-water mark.

Kingston-upon-Hull Dock Co. v. *Browne*, (1831) 2 B. & Ad. 43, discussed and distinguished.

APPEAL from a decision of Kekewich J.

The question was as to the construction of the words "the limits of the port of Carnarvon" in the Acts 33 Geo. 3, c. cxxiii., and 49 Geo. 3, c. xxiv., viz., whether the fiscal or customs port was meant, or only the local port or harbour, which was of much narrower extent.

The question arose with reference to the right of the trustees of Carnarvon Harbour to claim payment of rates and duties under the Acts.

The plaintiff was tenant for life in possession of the Vaynol Estate in the county of Carnarvon. The estate had a frontage of about two miles along the east side of the Menai Straits.

Port Dinorwic was a village on the east side of the Straits (about four miles north of Carnarvon), and so much of it as abutted on the Straits belonged to and formed part of the Vaynol Estate. At or near the village, partly on the estate and partly on land leased to the plaintiff by the Crown, docks and quays had been constructed and maintained by the plaintiff and his predecessors in title. They had also constructed a short canal and lock, connecting the docks and quays with the sea, so that at high water ships could go in and go out to and from the docks from and to the sea, and thus unload and load goods at the quays. These works were constructed after the passing of the second Act.

On the Vaynol Estate there were slate quarries, known as the Dinorwic Quarries, from which slates were brought down to Port Dinorwic and there loaded at the plaintiff's docks and quays on vessels belonging to the plaintiff and other vessels chartered by him, and were by them conveyed by sea to purchasers. These vessels usually passed out of the Menai Straits by the north end thereof.

These vessels brought back to Port Dinorwic in the same way for the plaintiff's use other goods which were unloaded at the plaintiff's docks and quays.

Under the above Acts the trustees of Carnarvon Harbour were empowered to levy certain rates or duties in respect of vessels loading or unloading within the limits of the port of Carnarvon, and also further rates or duties in respect of goods loaded on or unloaded from vessels within the limits of the port of Carnarvon. The trustees claimed to be entitled under these Acts to rates or duties in respect of vessels which passed through the north end of the Menai Straits to or from Port Dinorwic, although they did not pass through the south end of the Straits or sail further south than Port Dinorwic, and that they were also entitled to rates or duties on slates and other goods loaded or unloaded at Port Dinorwic, alleging that Port Dinorwic and all the plaintiff's docks, wharves and quays were within the limits of the port of Carnarvon mentioned in the special Acts.

The plaintiff claimed a declaration that Port Dinorwic, including his lands, wharves, quays and docks, was not within the limits of

C. A. 1905

ASSHETON SMITH v. OWEN.

the port of Carnarvon referred to in the special Acts; that the trustees were not entitled to claim rates or duties on vessels which passed through the north end of the Menai Straits to or from Port Dinorwic or the plaintiff's lands, wharves, docks and quays, or any rates or duties on slates or other goods loaded or unloaded on or from vessels at Port Dinorwic, or on or from the plaintiff's lands, docks, wharves or quays; and an injunction against the trustees in accordance with the above declarations.

The defendant was the collector and treasurer of the trustees, who, by virtue of s. 35 of the Act 33 Geo. 3, c. cxxiii., might be sued in the name of their treasurer, receiver or clerk.

By his defence the defendant asserted that Port Dinorwic and all the plaintiff's docks, wharves and quays were within the limits of the port of Carnarvon referred to in the special Acts.

The defendant also said that the plaintiff and his predecessors in title had for a great number of years paid to the trustees rates and duties on vessels passing through the north end of the Menai Straits to or from Port Dinorwic or the plaintiff's lands, wharves, docks and quays, and rates and duties on slates and other goods loaded and unloaded on or from vessels at Port Dinorwic and on or from the plaintiff's lands, docks, wharves and quays.

The defendant further said that the trustees did not maintain the plaintiff's docks, wharves or quays, which were his private property, but the trustees did incur and had incurred expenditure in respect of those docks, wharves and quays, and the approaches thereto, and did render and had rendered meritorious services in connection with the rates or duties claimed by them. The approaches to Port Dinorwic had been improved by placing a beacon on the embankment of the Britannia Bridge to the north, and all the dredging, cleaning, buoying and lighting done by the trustees to the south of Port Dinorwic was of service thereto, and the buoys extended nearly up to Port Dinorwic from the south, no buoys being necessary to the north of those so placed by the trustees. The trustees had spent 300*l.* upon blasting the Swelly Rocks or Swellies in the Menai Straits to the north of Port Dinorwic, and they had provided mooring posts on both sides of the Straits, extending from Voryd on the south up to and including

Port Dinorwic on the north, to enable vessels to load and unload, and these posts were renewed from time to time as required.

The Act 33 Geo. 3, c. cxxiii. (passed in June, 1793) was intituled, "An Act for enlarging, deepening, cleansing, improving and regulating the harbour of Carnarvon, in the county of Carnarvon." The preamble contained the following recitals: "Whereas the harbour of Carnarvon . . . . and the several channels leading thereto, have of late years by the flux and reflux of the tides, and from various other causes, been greatly choaked and filled up with mud, sand and dirt, and vessels of burthen are thereby prevented from getting up to the quays, wharfs, and landing places within the said harbour, and the shipping lying in the said harbour are exposed to inconvenience and danger: And whereas the quays and piers already made and constructed within the said harbour are not sufficient for the preservation thereof, and the reception and convenient lying of the ships and vessels resorting thereto, and for the requisite and convenient dispatch in loading and unloading; and it would be of great benefit and advantage to the merchants and others living in, or trading to and from the town and port of Carnarvon, and of publick utility, if the said harbour, and the several channels leading thereto, were properly enlarged, deepened, cleansed, improved, and regulated, and if new and additional piers and quays were constructed and built for the preservation and protection of the harbour, and the accommodation of the trade thereof."

Sect. 1 provided that a number of specified persons, "and their successors, to be elected in manner hereinafter mentioned, shall be, and they are hereby constituted and appointed trustees for putting this Act in execution."

Sect. 8 authorized the trustees "to lay and fix buoys and beacons in proper places upon the bar, and other banks and shores leading to and in the port of Carnarvon, . . . for the safety of ships and vessels."

Sect. 9 authorized the trustees to erect a lighthouse on Llandwyn Point outside the southern end of the Menai Straits.

Sect. 10 empowered and required the trustees to order the harbour of Carnarvon to be scoured and cleansed from gravel, sand, dirt, mud, and all other obstructions, and also to raise and

C. A. 1905 ASSHETON SMITH v. OWEN.

make, or cause to be raised and made, sufficient works from time to time for improving, enlarging, preserving, and securing the said harbour, and to cleanse, scour, deepen, and improve the channels leading thereto, by blasting the rocks, or otherwise, as they shall think proper, and also to erect such quays, piers, wharfs, breastworks or other works, as should from time to time be adjudged necessary by the trustees, as well for improving, enlarging, preserving, and securing the said harbour, as for the safe and commodious entrance and reception of all ships and vessels resorting thereto, and the convenient lading and unlading thereof.

By s. 12, "The several and respective rates or duties imposed by this Act, and also the right and property of all and every the piers, quays, wharfs, docks, locks, and other works to be erected, made or done, in pursuance of this Act, and the ground whereon such works shall be erected, shall be and the same are hereby severally vested in the said trustees and their successors for ever, for the purposes of this Act. . . . ."

By s. 16, "For the better effecting the several matters and things to be done in pursuance of this Act, and supporting the same for the future, there shall, from and after the said 5th day of July (1793), be paid to the said trustees and their successors, at such place or places within the said town of Carnarvon as they . . . . shall appoint, or to such person or persons as they . . . . shall from time to time appoint to collect and receive the same, and they the said trustees and their successors . . . . are hereby authorized and empowered to demand, collect, receive, and take, of and from the master or owner, masters or owners, or other person or persons having the rule or command of every ship or other vessel, the several rates or duties following; (that is to say,)

"For all ships or vessels belonging to foreign subjects, coming from foreign parts, and unloading their cargoes within the limits of the said port of Carnarvon, any sum not exceeding twelvepence per ton:

"For all ships or vessels belonging to foreign subjects, passing or sailing through the Straits of Menai, or arriving in the said port by stress of weather, or otherwise without unloading all or any

part of their cargoes within the limits of the said port, any sum not exceeding sixpence per ton:

"For all ships or vessels belonging to His Majesty's subjects, coming from foreign parts (Ireland excepted), unloading their cargoes within the limits of the said port, any sum not exceeding sixpence per ton; but if only coming to the said port by stress of weather, or otherwise, or sailing through the said Straits, not exceeding threepence per ton:

"For all coasting vessels unloading within the limits of the said port, any sum not exceeding threepence per ton; but if only unloading part of their cargoes, and proceeding to another port with the remainder, not exceeding twopence per ton:

"For all coasting vessels unloading within the limits of the said port, having above one half of their cargoes of coals, and the remainder of any other goods, wares, or merchandise, any sum not exceeding twopence per ton; but if with coals only, not exceeding one penny per ton:

"For all ships or vessels loading within the limits of the said port with slates, copper, ore, corn, or any other merchandize, bound to any foreign parts, Ireland, or coastways, any sum not exceeding threepence per ton:

"For all coasting vessels laden or part laden with goods (except limestone, sand, and manure), passing through the said Straits, any sum not exceeding one penny halfpenny per ton; if laden with limestone, or in ballast, not exceeding a halfpenny per ton."

Sect. 17 excepted from liability to the rates or duties ships of war belonging to the Crown, fishing vessels and some others.

The Act 49 Geo. 3, c. xxiv. (passed in April, 1809), was intituled, "An Act for the further improvement of the harbour of Carnarvon . . . . and for other purposes relating thereto."

The preamble recited the title of the Act of 1793, and continued: "Whereas great progress hath been made in the execution of the works by the said Act directed to be made: And whereas the powers and provisions of the said Act have been found defective and insufficient for the purposes thereby intended; and it is therefore expedient that the same should be altered, amended, and enlarged, and that the rates and duties thereby granted should be increased, and additional duties

C. A. 1905

ASSHETON SMITH v. OWEN

granted: And whereas the progressive increase of the trade of the said port makes it expedient that powers should be given to erect and construct additional piers, quays, wharfs, wet and dry docks, cranes, and other works and conveniences for the accommodation of ships and vessels resorting to the said port, and to purchase land, and embank shore ground from the sea for those purposes. . . . . "

Sect. 1 provided that the Act of 1793 and all the provisions "therein contained (save and except such parts as are hereby varied, altered, or repealed) shall be as good, valid, and effectual for carrying this Act into execution, as if the same had been repeated or re-enacted in the body of this present Act."

By s. 3, "From and after the 5th day of July next after the passing of this Act, the several rates and other dues or payments which might be demanded, taken, collected, or received under or by virtue of the said recited Act, shall cease and determine, and shall not be demanded, taken, collected, or received."

By s. 4, "In lieu and instead of the said several before mentioned rates and duties by this Act repealed, there shall be paid to the said trustees and their successors, from and after the said 5th day of July . . . . and they the said trustees and their successors . . . . are hereby authorized and empowered to demand, collect, receive, and take of and from the master or owner, masters or owners, or other person or persons having the rule or command of every ship or other vessel, the several rates or duties mentioned in the first schedule hereunto annexed, marked (A)."

By s. 5, "There shall be paid by every person whomsoever who shall lade or unlade, or import or export any grain, seeds, goods, wares, merchandize, baggage, parcel, or other article, matter, or thing whatsoever within the said harbour of Carnarvon, or within the limits of the said port, over and above all other rates and duties to which the same respectively are by virtue of any law or statute subject or liable, any sum or sums of money, not exceeding the several rates and duties hereinafter mentioned and contained in the second schedule hereunto annexed, marked (B)."

By s. 7, "No collector or comptroller of His Majesty's customs, receiver of entries, or ships' surveyor or searcher, waiter or other officer of the customs whatsoever, belonging to the port of Carnarvon, within the port of Chester, shall at any time after the said 5th day of July . . . . give or make out any cocket or other discharge, or take any report inwards or outwards for any ship or other vessel, or permit any ship or other vessel to come in or go out of the said harbour, or from any landing-place within the limits of the said port, until the master or owner, or other persons having the rule or command of such ship or other vessel, shall produce a certificate from the collector or collectors, lessee or lessees, to be appointed in pursuance of this Act, that the rates or duties by this Act granted are paid or secured to be paid . . . . "

By s. 15, "It shall be lawful for the said trustees . . . . to blast, break, or remove . . . . all, every, or any of the rocks at the Swellies, or in any other part of the said Straits within the said port of Carnarvon, for the more safe passage of ships and vessels to and from the said harbour, and through the said Straits; and that the sum of three hundred pounds, already expended in the improvement of the Swellies, shall be and is hereby declared to be a charge on the duties hereby granted, as fully and effectually as any other sum borrowed or to be borrowed under or by virtue of this Act."

Sects. 16, 17 and 19 empowered the trustees to make various improvements in the harbour of Carnarvon by embanking shore ground and constructing wet docks and a dry dock.

Sched. (A) to the Act was expressed in terms in substance similar to those of s. 16 of the Act of 1793, except that the amounts of the rates or duties were to some extent altered, and the following new clause was added: "For all ships or vessels belonging to foreign subjects, loading within the limits of the said port with slates or any other merchandize, any sum not exceeding the sum of sixpence per ton."

Sched. (B) was headed "Rates and dues to be paid for landing and shipping of goods, wares, and merchandize, in the port of Carnarvon, which may be imported, exported, brought and carried coastwise, and referred to in and by the foregoing Act," and the amounts of the rates and dues were then stated.

C. A. 1905

ASSHETON SMITH v. OWEN.

Under the powers conferred by the Act 13 & 14 Car. 2, c. 11, which is intituled "An Act for preventing frauds, and regulating abuses in His Majesty's customs," and subsequent Acts, Royal Commissions were from time to time issued for the purpose of defining the limits of the port of Carnarvon, and for assigning lawful quays or wharves for lading and unlading goods.

On July 3, 1723 (9 Geo. 1), a Royal Commission was issued under the last-mentioned Act, by which (inter alia) there was given to the Commissioners thereby appointed "full power and authority by these presents to repair to our towns and ports of Aberconway, Beaumaris, Carnarvon, Holyhead and Pulhelly, and to search, find out and survey the open places there and thereabouts, and to assign and appoint in each of them all such and so many open place and places to be places, keys, or wharfes for landing and discharging, lading and shipping of goods, wares and merchandize within our towns and ports of Aberconway, Bewmaris, Carnarvon, Holyhead, and Pulhelly aforesaid, as according to your good discretion or the discretions of any three or more of you shall seem most convenient and fitt for the uses and services aforesaid, and to sett downe, appoint and settle the extents, bounds and limitts of the said ports and towns aforesaid, and of all such places, keys or wharfes, by sufficient meets, limitts, and bounds, and utterly to prohibit, disanull and make void, determine and debarr all other places within the said ports and towns from the priviledge, right and benefit of a place, key or wharfe for the landing or discharging, lading or shipping of any goods, wares or merchandize as aforesaid (except respectively the goods and merchandize before excepted)." The excepted goods were "fish taken by His Majesty's subjects, bestialls, and salt."

On November 21, 1723, the Commissioners made their return to the Commission in respect of the por of Carnarvon.

The return was entitled "Port of Carnarvon, a member of the Port of Chester," and the Commissioners thereby stated: "Wee doe hereby appoint, sett down and settle the extents, bounds and limitts of the said Port to be as followeth (to witt)

from the mouth of the River Maltraith in Anglesey and along the East side of the said river Northward to the middle of Carnarvon Bay Southwardly seaward, and from thence to the River called Avon Hen in Carnarvonsheire, eastward from thence to the South side of the Swelly Rocks in the River Menay Northward, and all the said River Southwardly.

"And by virtue of the said Comiccon wee have assigned and appointed and by these presents doe assigne and appoint the severall open place or places hereafter menconed to be placed keys or wharfes respectively for the landing and discharging, lading or shipping of any Goods Wares or Merchandizes within the said Port of Carnarvon (to witt) from the corner of the first larg tower from the Queen's Gate in Carnarvon Castle Eastwardly to the Eagle Tower of the said Castle westwardly from thence to the Bell Tower of the said towne Northwardly and then to Robins Tower Eastwardly being about six hundred and thirty yards distance in length and bounded by the River Saint on the South the River Menay on the West and the River Cadnant on the North East side and the toun of Carnarvon and Castle on the other side."

The landing-places thus fixed were all close to the town of Carnarvon.

The limits of the port of Carnarvon as fixed by this instrument extended along the Menai Straits to the Britannia Rock, north of Port Dinorwic, so as to include that port. The evidence shewed that the trustees, in the exercise of the powers conferred on them by their Acts, had (inter alia) erected a lighthouse at Llandwyn Point (outside the south end of the Menai Straits), had buoyed the channel of the Straits from the south end nearly up to Port Dinorwic; and had blasted the Swelly Rocks, which were situate to the north of Port Dinorwic. They had also dredged or scoured the bar at the south end of the Straits, and had placed beacons to the north of Port Dinorwic. There was evidence that, for many years and up to a short time before the commencement of the action, the duties imposed by the Acts had without any objection been paid by the plaintiff and his predecessors in title to the trustees in respect of ships going through the north end of the Straits and loading and unloading

C. A. 1905

ASSHETON SMITH v. OWEN.

goods at the plaintiff's quays at Port Dinorwic, and in respect of the goods loaded and unloaded there.

The questions were—(1.) whether the words "the limits of the port of Carnarvon," as used in the special Acts, meant the limits of the fiscal or customs port; and (2.), if that was the meaning, whether the plaintiff's docks and quays were within those limits, inasmuch as they were situate beyond and further inland than the natural high-water mark of the sea as that mark existed at Port Dinorwic at the time of the passing of the second Act.

Kekewich J. dismissed the action. He held upon the construction of the two Acts of George III. that "the limits of the port of Carnarvon" meant the limits of the fiscal or customs port, and also that the limits of the port at any particular spot must be the actual high-water mark of the present day at that spot, even though the position of that mark was the result of man's work.

The plaintiff appealed.

P. O. Lawrence, K.C., Danckwerts, K.C., Bryn Roberts, and *A. F. Peterson,* for the plaintiff. It is submitted—(1.) that on the true construction of the special Acts the "limits of the port" means the limits of the local port or harbour of Carnarvon, not the fiscal or customs port; (2.) that, if the fiscal port is meant, still the plaintiff's docks and quays are not within the limits of that port, they having been constructed further inland than the natural high-water mark of the sea at the date of the passing of the Act of 1809.

The first question is what is the proper meaning to be given to the word "port." According to the decisions, the word means the locality, and not the fiscal port. For instance, in *Kingston-upon-Hull Dock Co.* v. *Browne* (1), the word "port" was held to mean a port in the popular sense, and not as extending the burden of dock dues to places which, in point of locality, were outside the port of Hull. So, also, in *Stourbridge Canal Co.* v. *Wheeley.* (2) An Act of Parliament giving privileges to a port must, in case of any ambiguity, be construed in favour of the

(1) 2 B. & Ad. 43. (2) (1831) 2 B. & Ad. 792.

public: *Stockton and Darlington Ry. Co.* v. *Barrett.* (1) That a "port" means a port in its popular, business, or commercial sense, that is, a port to which ships resort for loading or unloading, has been decided in several other cases: *Price* v. *Livingstone* (2); *Sailing Ship "Garston" Co.* v. *Hickie & Co.* (3), approved in *Hunter* v. *Northern Marine Insurance Co.* (4); *Reg.* v. *Hannam.* (5) The things required for loading and unloading ships are such conveniences as shelter-quays, and the intention is that dues shall be paid to the persons who provide those conveniences, in the present instance at the town of Carnarvon and nowhere else. Dues are not payable unless the ship receives some benefit from the harbour: *Matson* v. *Scobel.* (6) It is submitted that the whole Act is intended for the benefit of Carnarvon Harbour.

[They also referred to the Customs Act, 1845 (8 & 9 Vict. c. 86), s. 153, giving power to the Crown to appoint ports and legal quays; to the Customs Act, 1846 (9 & 10 Vict. c. 102), s. 13 (repealing s. 153 of the previous Act), s. 14, empowering the Treasury by warrant to appoint ports and quays and to declare the limits thereof, and s. 16, requiring that the appointment of any "port," &c., and every declaration of the limits thereof, shall be published in the *Gazette*.]

The Act of 1793 was passed for the enlargement and regulation of the harbour of Carnarvon. At that date the only place in this district where there were quays for loading ships was Carnarvon. If a charter is granted by statute the statute has for many purposes the same effect as an ordinary charter would have. A charter is granted by the Crown by virtue of its inherent power; an Act of Parliament is made by the Crown with the consent of the Houses of Parliament. It is submitted that the object of this Act was to create a franchise port, as distinguished from a fiscal port, at Carnarvon. "The franchise of a port is a thing distinct from the ownership of the soil, and scarcely a case can be shewn where the soil of the

(1) (1844) 11 Cl. & F. 590, 601, 607.
(2) (1882) 9 Q. B. D. 679.
(3) (1885) 15 Q. B. D. 580.
(4) (1888) 13 App. Cas. 717, 722.
(5) (1886) 34 W. R. 355; 2 Times L. R. 234.
(6) (1768) 4 Burr. 2258.

C. A. 1905 ASSHETON SMITH v. OWEN.

port and the franchise are united in the same ownership. It is to be noted that there is a wide distinction between the local port, the franchise of which may have been granted to the subject, and the Royal or fiscal port remaining in the Crown:" Stuart Moore's History of the Foreshore, 3rd ed. p. 809, note (*p*). Small ports or havens granted to the subject "scarcely ever extend beyond the mouth of the river or creek on which the caput portus is situate. The former extend all round the coast, and are variable in extent at the pleasure of the Crown:" Stuart Moore's History of the Foreshore, 3rd ed. p. 828, note (*l*). A franchise port is invariable, but a fiscal port is often altered. Carnarvon possesses all the characteristics of a port as defined in Hale, De Portibus Maris, cap. 2, Hargrave's Law Tracts, p. 46; approved in *Foreman* v. *Free Fishers of Whitstable*. (1) Therefore it is to be assumed that the tolls, rates or duties which are charged have a legal origin. The Carnarvon trustees have to keep the channels open, and the quays in repair, and all ships have the benefit of them, so the dues are reasonable. There is no express obligation on the harbour trustees to keep the navigation secure, but that duty is cast upon them by the common law in consideration of the dues: *Parnaby* v. *Lancaster Canal Co.* (2); *Winch* v. *Thames Conservators*. (3) But the plaintiff receives no benefit in return for the dues which he is called upon to pay; he has his own quays and docks. By s. 4 of the Act of 1809 the trustees are empowered to levy the rates now in force, and it makes no difference that they are appointed by Act of Parliament instead of by charter: *Darley* v. *Reg.* (4) This is therefore a statutory franchise, and Carnarvon is on the true construction of this Act a franchise port.

On the fair and reasonable construction of these Acts they point to things to be done at or in the neighbourhood of Carnarvon itself. The powers of the trustees are confined to the town of Carnarvon and its vicinity. This is shewn by the Chester and Holyhead Railway Act, 1845 (8 & 9 Vict. c. xxxiii.), s. 21. Carnarvon is never spoken of as a fiscal port; it is referred to in ss. 8 and 9 of the Provisional Order sanctioned by the Act, 40 & 41

(1) (1869) L. R. 4 H. L. 266.
(2) (1839) 11 Ad. & E. 223.
(3) (1874) L. R. 9 C. P. 378.
(4) (1846 12 Cl. & F. 520, 539, 543.

Vict. c. lxxiv., as "the harbour and works," which would be an absurd description of a fiscal port. The Carnarvon Acts are both modern Acts, and the doctrine of contemporanea expositio does not apply: *North Eastern Ry. Co.* v. *Lord Hastings* (1); *Kingston-upon-Hull Dock Co.* v. *Browne* (2). The fact that the plaintiff's predecessors many years ago paid dues to the trustees is so trifling that the Court will not attach any importance to it: *Nicholson* v. *Williams* (3); *Sheppard* v. *Gosnold.* (4)

[VAUGHAN WILLIAMS L.J. referred to Broom's Legal Maxims, 7th ed. p. 518.]

THE COURT then called on the defendant's counsel to argue the question of the construction of the two special Acts before the second point was dealt with.

Warmington, K.C., *Stewart-Smith, K.C.*, and *R. M. Montgomery*, for the defendant. It is contended that the words "within the limits of the port" have always been recognized by the Courts as referring to the customs or fiscal port, and if those words are so construed in these special Acts, Port Dinorwic will be included within the limits of the port of Carnarvon. Before the reign of Queen Elizabeth ports were in most cases constituted by royal charter, and most of those charters did not contain negative words. The Act 1 Eliz. c. 11 restricted the lading and unlading of goods to places within customs ports. The Act 13 & 14 Car. 2, c. 11, which is intituled "An Act for preventing frauds, and regulating abuses in His Majesty's customs," enabled the Crown to issue Commissions for the purpose of fixing the extents and limits of ports and appointing lawful places within them for the loading and unloading of goods. By the return to the Commission of July, 1723, the limits of the port of Carnarvon were fixed so as to include Port Dinorwic, and those limits must be taken to be the limits of the port intended by the Act of 1793. No doubt at the time when that Act of 1793 was passed, Carnarvon Harbour was the principal place within the limits of the port at which the loading or unloading of goods took place. But the evidence in the present case shews that from the passing of that Act the rates or duties prescribed by it have been in fact

(1) [1900] A. C. 260.
(2) 2 B. & Ad. 43, 59.
(3) (1871) L. R. 6 Q. B. 632.
(4) (1670) Vaugh. 159, 170.

C. A. 1905 — ASSHETON SMITH v. OWEN.

paid at every place within the limits at which goods have been landed. The allowing persons to come into and go out of the realm is part of the prerogative of the Crown: see Magna Charta. And "The King is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm": Blackstone's Commentaries, 8th ed. 1778, vol. i., p. 264. In the Act of 1793 the technical expression, "limits of the port," is not used until s. 16; after that section the expression is used several times. The limits of the port include both sides of the Menai Straits, and the work which is done by the trustees is to a great extent outside what has been spoken of as "the popular port." Why should the duty of keeping the Straits outside the harbour of Carnarvon safe for navigation and constructing and maintaining the necessary works be cast upon the trustees, while those who benefit by what the trustees do are not to contribute to the cost? The trustees derive no profit from what they do; all the moneys which they receive from the rates and duties are applied by them in improving and providing for the safety of navigation within the whole of the port of Carnarvon as defined by the Commissioners. There is, therefore, nothing unreasonable in the levying of these duties upon all persons who load or unload goods within those limits, inasmuch as they derive benefit from the trustees' expenditure. *Kingston-upon-Hull Dock Co.* v. *Browne* (1) is distinguishable from the present case. In that case the limits of the port of Hull were fixed by a special Act, but the judgment of Lord Tenterden C.J. implies that the port of Hull might have the wider limit of the fiscal port. But the circumstances of that case were entirely different from those of the present case. As Lord Tenterden said, there must be some relation between the benefit conferred and the duties levied, and in that case no benefit was given to the defendants, who did not load or unload goods within the port of Hull in the popular sense. Nothing was done by the Hull Dock Co. in any way corresponding to the work which is done by the Carnarvon trustees at the top of the Menai Straits and in the Channel. In *Nicholson* v. *Williams* (2) it was held

(1) 2 B. & Ad. 43; see per Lord Tenterden at p. 59.

(2) L. R. 6 Q. B. 632.

that, for the purposes of an order made by the Board of Trade under 25 & 26 Vict. c. 69, s. 16, prohibiting "the taking of shingle from the shores of the port of Kingston-upon-Hull," the port extended to the limits defined by an order of the Treasury made in 1848, under 9 & 10 Vict. c. 102, which extended far beyond the port of Hull in the popular sense. In that case Lush J. treated the expression "limits of the port" as meaning the limits for fiscal purposes, the area of the port as constituted by statute or under a Commission. The Court said that, if the question were whether a right to anchorage or other dues would by virtue of the Treasury order be extended over the enlarged area, the case would be widely different. "The answer that the enlargement was made for customs purposes, and not to benefit the grantee of the dues, would be conclusive." The expression has acquired a technical meaning, and there is nothing unreasonable in giving that meaning to the words as used in the Carnarvon Acts.

In Tomlin's Law Dictionary, 4th ed. vol. ii., "port" is defined as "a harbour or place of shelter, where ships arrive with their freight, and customs for goods are taken." The names of the ports in England are then given, Chester being one, and it is added, "to these ports there are certain members belonging, and a number of creeks, where commonly officers are placed, by way of prevention of frauds in the customs; but these are not lawful places of exportation or importation, without particular license from the port or member under which they are placed."

[VAUGHAN WILLIAMS L.J. As regards the right to land goods, is there any distinction between customable and non-customable goods?]

The statutes which restrict the right of landing seem to apply to all goods without any distinction, but the authorities say that the restriction applies only to customable goods: see Hall on the Seashore, printed in Stuart Moore on the Foreshore, 3rd ed. pp. 850, 852; Hale, De Portibus Maris, cap. 6, Harg. Law Tracts, p. 73; Houck on Navigable Rivers, p. 184, referring to *The Baltimore Wharf Case* (1); Coulson and Forbes on Waters, 2nd ed. p. 50.

(1) (1830) 3 Bland (Maryland, Chancery), 361, 383.

C. A. 1905

ASSHETON SMITH v. OWEN.

[VAUGHAN WILLIAMS L.J. Does the restriction apply to the loading of a man's own goods for exportation?]

It would seem that this point has not been considered, because generally there is no customs duty on goods exported. The trustees, in the exercise of the powers conferred on them by their Acts, render services from which the plaintiff derives benefit, e.g., the erection of the lighthouse, the blasting of the Swelly Rocks, the buoying of the channel, and other things. There will be no hardship if the plaintiff has to pay the rates and duties in respect of these services rendered to him. The object of the Acts was to constitute a body which should deal with the whole of the navigation of the Straits. *Foreman* v. *Free Fishers of Whitstable* (1) only decided that there must be a legal origin of dues. For dues within the limits of a port no services need be rendered; the fact that it is a port is sufficient consideration for the dues. If the power to levy dues within the limits of a port is conferred by statute, the only question is, what are the limits of the port—how are they defined? It is said by the plaintiff that the word "port" must mean the "port" in the popular sense of the word; if it means something wider than that it must mean the fiscal port—the port for customs purposes. Port Dinorwic is clearly within the fiscal limits of the head port, Chester. *Beilby* v. *Raper* (2) is distinguishable from the present case. The plaintiff's construction of the Acts would practically take away from the trustees all the funds available for meeting their expenses. They would have to discontinue doing any works or go to Parliament for an extension of their powers.

Danckwerts, K.C., in reply. The judgment in *Kingston-upon-Hull Dock Co.* v. *Browne* (3) laid down two general propositions: (1.) That "dues" are always imposed in consideration of benefits conferred by the persons who are authorized to levy them upon the person who has to pay them. (2.) If one set of persons are claiming the right to tax others they must make it perfectly plain that they are empowered to do so: *Matson* v. *Scobel.* (4) A port is "always graced with legal privileges":

(1) L. R. 4 H. L. 266.
(2) (1832) 3 B. & Ad. 284.
(3) 2 B. & Ad. 43.
(4) 4 Burr. 2258.

Callis on Sewers, 4th ed. p. 72; Stuart Moore on the Foreshore, 3rd ed. p. 321. The word "port" may also be used fiscally. Most of the Acts which fixed the limits of ports did so for fiscal purposes. Those limits were formerly set out by Commissions, but now this is done by the Treasury, as provided by the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 11. Goods not liable to customs duties may be landed at any place. There are many private Acts in which the expression "limits of the port" is used when it is impossible that the fiscal port could be intended. The benefits conferred by the Carnarvon trustees are remunerated by the dues levied on passing vessels. If, in fact, any vessels which do not come within the port obtain advantages without paying for them that is no reason for extending the limits of the port. But in truth most of the alleged benefits in the present case are unsubstantial.

All the powers given to the trustees by their Acts are for the purposes of the port or harbour of Carnarvon. In the first Act "port" can only refer to "harbour." The word "harbour" had a well-known meaning when the first Act was passed, and "port" must have the same meaning in the second Act.

The ordinary meaning of "port" is a place in which facilities are provided for the loading and unloading of goods, and in the present case these are provided by the trustees only in the harbour of Carnarvon. Sect. 7 was inserted for a particular purpose. The right for one subject of the Crown to impose taxation on another must be given in clear and distinct words: *Stockton and Darlington Ry. Co.* v. *Barrett* (1); *Stourbridge Canal Co.* v. *Wheeley* (2); *Tennant* v. *Smith.* (3)

July 27, 28. The second point was now argued.

P. O. Lawrence, K.C., Danckwerts, K.C., Bryn Roberts, and *A. F. Peterson,* for the plaintiff. The second point is that, even if the "limits of the port" in the Acts means the limits of the fiscal port, still the plaintiff's docks and quays are not within those limits. Those docks and quays have been constructed on his own

(1) 11 Cl. & F. 590. (2) 2 B. & Ad. 792.
(3) [1892] A. C. 150.

C. A. 1905

ASSHETON SMITH v. OWEN.

land. In this construction the natural channel of the water has been extended, so that the sea now comes further inland than it did in the natural state of things. It is submitted that the port cannot extend further than the natural high-water mark before the alterations were made, and that being so the quays where the plaintiff's goods are loaded and unloaded are outside the limits of the port. Consequently the plaintiff is not liable to pay the duties imposed by the Acts. The limits of the port of Carnarvon as fixed by the Commission of 1723 were defined by the then high-water mark, and the "port" does not extend beyond that. The defendant by his pleading admits that the plaintiff's docks are on his own private property and that the trustees refuse to keep the plaintiff's docks in repair or to improve them. But it is said that they incur expenses in respect of the plaintiff's docks by buoying the channel of the Straits and in other similar ways. Those expenses are covered by the passing dues. No subject can enlarge a port. So long as no nuisance is committed a riparian owner could use the water of a river to fill a pond or a dock, but that would not make the pond or dock a part of the river. It is submitted that the plaintiff is entitled to load or unload goods in or from his own ship or ships chartered by him at his own docks or quays without paying any dues to the trustees. A man may unload on his own land his own private goods which are not liable to customs duties: *Blundell* v. *Catterall* (1); *Brinckman* v. *Matley*. (2) The trustees are not concerned in the question whether the plaintiff is lawfully or unlawfully landing his goods; that is a matter for the Crown. If the plaintiff is acting unlawfully that does not render him liable to pay dues to the trustees. It is submitted that the plaintiff's docks and quays are outside the limits of the fiscal port as they were fixed in 1723. The plaintiff may have to pay the dues which are imposed on coasting vessels which do not come into the harbour of Carnarvon. As regards the other dues the trustees are bound to shew that the plaintiff's docks are situate within the limits of the port. Suppose there were a dock situate a long way inland and connected by a channel with the sea. Suppose the channel became blocked up, and the dock was by means of a new channel connected

(1) (1821) 5 B. & Al. 268, 294, 295, 302. (2) [1904] 2 Ch. 313.

with the port of Beaumaris. Would the Carnarvon trustees be entitled to levy dues on goods landed at the dock?

Warmington, K.C., *Stewart-Smith*, K.C., and *R. M. Montgomery*, for the defendant. This point must be considered apart from any question of the ownership of the land. The Acts do not in any way affect the ownership of the land. The theory of the Acts is that all goods which come from the water to the land within the limits of the port are liable to pay the dues. The Acts in fact prohibit the landing of goods within those limits except upon payment of the dues, and that prohibition has nothing to do with the ownership of the land. Suppose a ship were placed upon rollers, and were thus rolled a long way inland and there unloaded, that would, it is submitted, be an unloading within the limits of the port. The Act says nothing about the land limit of the port. At whatever point you pass from the sea to the land that point is within the limits of the port and is within the operation of the Acts. But for the Acts the plaintiff could lawfully have done what he has done; but the Acts override all rights and confer a franchise on the trustees. The Acts adopt the limits of the fiscal port as they existed at the time when they were passed. Digging a cut from the port into your own land, and thus letting in the water from the Menai Straits would be using the port. This is the reasonable construction of the Acts. A port is not merely a piece of water, it is a piece of water with adjacent land: *Hunter* v. *Northern Marine Insurance Co.* (1) There is no definitely fixed line of demarcation landward. Suppose a boat were loaded on the land and then drawn down to the sea, the port would be where the loading took place. The definition of the port of Carnarvon itself includes the quays and wharves. The restriction is inserted to prevent its being said that any part of the water is not within the port; not to prevent its being said that any part of the land is within the port.

These dues constitute the only fund to meet the cost of building and repairing the quays; if the quays are outside the port there would be no fund for the purpose.

The word "limits," used in connection with a port, cannot have a hard and fast meaning: it must be construed according to the

(1) 13 App. Cas. 717, 722.

C. A. 1905 — ASSHETON SMITH v. OWEN.

particular circumstances, as in the case of the word "adjacent," the degree of proximity denoted being a question of circumstance: *Wellington Corporation* v. *Lower Hutt Corporation* (1), which case, arising under an Act imposing a financial burden, applies to the present case. In a fiscal port all land adjacent to the sea is within the port: the port is not limited by the line of high-water mark; and no landward boundary is to be found set out in any of the Commissions relating to the various ports. The proposition that high-water mark is the limiting line of a fiscal port is now put forward for the first time. No defined land-limit of a fiscal port has ever been fixed. It is clear that the word "port" includes land as well as the sea, though not the ownership of the land: Hale, De Portibus Maris, Hargrave's Law Tracts, pp. 54, 61, 76, 77, 85. If, then, it is once established that some land comes within the ambit of a port, it does not matter whether the line of the land can be defined: the fact that any land is within the port is enough to defeat the plaintiff's case.

Peterson, in reply.

Cur. adv. vult.

Dec. 20. The following judgments were read:—

VAUGHAN WILLIAMS L.J. The question is whether the plaintiff, who owns on his private property docks which through the port of Dinorwic communicate with the Menai Straits, is liable to pay to the trustees under the statutes 33 Geo. 3, c. cxxiii., and 49 Geo. 3, c. xxiv., any and what duties. The answer depends upon the construction of those Acts. I will deal hereafter with the question what construction ought to be put upon these Acts, having regard only to the words to be found within their four corners; but before doing so I desire to deal with two points which were strongly relied on by Mr. Warmington.

The first point is based upon the definition of the port of Carnarvon as a customs port in the certificate made in 1723 by Commissioners appointed under the statute 13 & 14 Car. 2, c. 11. It was argued that the word "port" in these Carnarvon Acts of 1793 and 1809 ought to be construed as meaning the

(1) [1904] A. C. 773.

port of Carnarvon as defined in that certificate. I cannot agree. The object of the statute of Car. 2 and the objects of the Carnarvon Acts are wholly different. The statute of Car. 2 is intituled, "An Act for preventing frauds, and regulating abuses in His Majesty's customs," and by s. 14 it authorized the Crown by Commission out of the Court of Exchequer to "assign and appoint all such further" (that is, beyond the places assigned as ports for shipping or discharging goods in or out of vessels by Commissions issued under the statute 1 Eliz. c. 11) "places, ports, members and creeks . . . . as shall be lawful for the landing and discharging, lading or shipping" of goods within England and Wales, and provided also for setting down and appointing "the extents, bounds and limits of every port, haven or creek," and made it unlawful to load or discharge goods but only from and upon the places appointed. The Commission recites that the "extents, bounds and limits" of certain ports, including "Beaumaris, Carnarvon and Pwllheli to our port of Chester belonging," were not fully ascertained, and it empowers the Commissioners "to sett downe, appoint and settle the extents, bounds and limits of the said ports and towns," and the places, quays or wharfs for landing and discharging, loading and shipping goods within the said towns and ports, "by sufficient meets, limits and bounds, and utterly to prohibit . . . . all other places within the said ports and towns from the priviledge, right and benefit of a place, key or wharfe for the landing or discharging, lading or shipping of any goods." And then the Commissioners by their certificate appointed and settled the extents, bounds and limits of the port of Carnarvon by these words: "Wee doe hereby appoint, sett down and settle the extents, bounds and limitts of the said port to be as followeth (to witt) from the mouth of the river Maltraith in Anglesey and along the East side of the said river Northward to the middle of Carnarvon Bay Southwardly seaward and from thence to the river called Avon Hen in Carnarvonsheire, Eastward from thence to the South side of the Swelly Rocks in the river Menay Northward and all the said River Southwardly." And the certificate proceeds to appoint "the severall open place or places hereafter menc̃oned to be places Keys or Wharfes respectively

C. A. 1905 — ASSHETON SMITH v. OWEN. — Vaughan Williams L.J.

for the landing and discharging, lading or shipping of any goods, wares or merchandizes within the said port of Carnarvon, to witt," and then follows a description of the quays and wharves.

It will be observed that all these places for loading and unloading are in close proximity to Carnarvon town and Castle, the whole space being bounded by the rivers Seiont and Cadnant and the Menai Straits and the town and castle of Carnarvon. I cannot think that the definition of the limits of the port of Carnarvon contained in this certificate of November 21, 1723, made under an Act for preventing frauds and regulating abuses in the customs, ought to determine the meaning of the word "port," or of the words "within the limits of the said port" in an Act passed in 1793, some seventy years afterwards, and, as appears by the title, passed "for enlarging, deepening, cleansing, improving and regulating the harbour of Carnarvon, in the county of Carnarvon," especially as some parts of the customs port are clearly outside the county of Carnarvon.

The second point made by Mr. Warmington was, that these words, "limits of the port," had been recognized in Acts of Parliament and legal documents as having a technical meaning, that is, the meaning which the words have in statutes and Commissions defining fiscal or customs ports. It is true that in *Kingston-upon-Hull Dock Co.* v. *Browne* (1), Lord Tenterden C.J., in construing s. 44 of the Hull Act, in which the mention is not of "the port of Hull," as in the former sections, but the words "limits of the port of Hull" are used, construed these words as meaning something distinct from the words "port of Hull." But he did not so construe the words on the ground that they had a technical meaning, or even a prima facie technical meaning, but on the ground that s. 44 of that Act, which spoke of vessels coming or going "coastwise from or to any port or place in Great Britain, to or from any place up the rivers Trent or Ouse within the limits of the port of Hull, as now used . . . . may have been intended to prevent frauds upon the revenue of the dock company by the discharge or receipt of goods in the river Humber," and that "the meaning of the words 'limits of the port of Hull' is explained by the charter of the Corporation

(1) 2 B. & Ad. 43, 61, 62.

of the Trinity House at Hull, wherein the words 'limits and liberties' are used to denote the places whereat the King's Customer of Hull had authority to take any custom by the name of primage." And Lord Tenterden, having stated this, held that, although this s. 44 was in the form of a proviso, and ought perhaps in strict propriety to be considered as an exception from s. 42 (the section empowering the Hull Company to take rates), and therefore as an exception from the preceding section, yet held that s. 44 ought to be considered "as introduced by way of caution, and to prevent doubts and questions, rather than as explanatory of or enlarging the sense in which the words 'port of Kingston-upon-Hull' are to be understood in s. 42." I cannot think that this case is any authority for the proposition that the words "within the limits of the port" have ever acquired a recognized technical meaning as denoting a customs port, and certainly not as an authority that the words "within the limits of the *said* port" can have such a meaning in an Act in which "the said port" is generally used in the sense of the local port, and not in the sense of a customs port.

I will now deal with the construction of these Carnarvon Acts. There can be no doubt that the word "port" is used throughout these Acts generally, as from their titles one would expect to be the case, in the sense of a port situate on the Menai Straits with the town of Carnarvon near thereto. The only section in either Act in which it can be said that the word "port" is plainly used in a wider than this popular sense is s. 15 of the second Act, which gives power to remove the rocks "at the Swellies or in any other part of the said Straits within the said port of Carnarvon," the Swellies being outside anything which would fall within the word "port" in its widest sense of local port. But I doubt whether by reason of what is contained in this section we ought to enlarge the meaning of the word "port," for that word must have been construed originally under the earlier Act, which makes no mention of the Swellies. It is remarkable that this s. 15, which, it has been argued, necessitates the construing of the word "port" in the sense of customs port, does not make use of the words "limits of the port," but uses the word "port." The real question, however, which has to be decided is the

C. A. 1905

ASSHETON SMITH v. OWEN.

Vaughan Williams L.J.

construction of the words "limits of the said port" in s. 16 of the earlier Act and in Sched. (A) to the later Act, that is, in that part of those Acts respectively which authorizes the taking of rates by the trustees. Now there is an undoubted change in the form of expression used in that part of these Acts from that which is used in the Acts generally. Prima facie there must be a reason for this change. I find it very difficult to suppose that the reason was to include in the area within which the rates might be levied the whole area of the fiscal port, extending from the Britannia Rock to Avon Hen, in the greater part of which the harbour trustees render no service whatever to vessels loading or unloading. It seems to me more probable that the words "within the limits of the said port" were adopted in the charging sections for the purpose of including the port of Carnarvon in its widest local sense, including, so far as the rates relate to loading or unloading, not only the harbour of Carnarvon but also the shore ground or strand in front of or adjoining to the harbour and the approach thereto. It is to be observed that by both Acts power is given to the trustees to acquire land on shore ground and strand, and the very fact of such an enlargement being contemplated for the accommodation of those who come to the port to load or unload their vessels is in itself some reason for making use of the words "limits of the said port" instead of the word "port."

I do not think it worth while to go through s. 16 and Sched. (A) paragraph by paragraph in order to discuss the difficulties which it was suggested would arise on the words of the various paragraphs if the words "limits of the said port" were to be construed as meaning the fiscal port. I will only observe that s. 5 of the second Act authorizes the levying of the new rates specified in Sched. (B) to be paid by every person who shall lade or unlade grain or other goods "within the said harbour of Carnarvon or within the limits of the said port"; and when we come to Sched. (B) we find that the words used are "Rates and dues to be paid for landing, &c., goods, &c.," not "within the limits of the port of Carnarvon," but "in the port of Carnarvon." Upon this question of the meaning of the word "port" in these Acts I ought to say that I cannot agree

with the conclusion of Kekewich J. that the words of s. 8 of the first Act which authorize the trustees to "lay and fix buoys and beacons in proper places upon the bar and other banks and shores leading to and in the port of Carnarvon," necessitate the construing of "port" in that section as meaning the customs port. I do not agree, for I read the words "buoys and beacons in proper places upon the bar and other banks and shores leading to and in the port of Carnarvon" as meaning the bank which forms the bar and "other banks and shores leading to and in the port of Carnarvon" as qualifying the word "bar."

Having thus dealt with that which is to be found within the four corners of the Acts I approach their construction, as Kekewich J. did, according to the rule laid down by Lord Tenterden C.J. in *Kingston-upon-Hull Dock Co.* v. *Browne* (1), viz.: "These rates are a tax upon the subject; and it is a sound general rule, that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the Legislature to impose it. And it is not to be expected, generally, that a tax or burthen will be imposed upon persons who do not in any degree participate in the benefits of the measure which the tax was intended to remunerate."

I find some difficulty in saying that the rates and duties imposed by these Acts are plainly imposed on those who load or unload goods at a port situate, as Port Dinorwic is, within the fiscal port of Carnarvon, but not within the port of Carnarvon in the sense of a harbour or a local port, where ships can be accommodated for the purpose of loading and unloading. But I do think that ships loading or unloading at Port Dinorwic may and do participate in the benefit of the works which the tax was intended to remunerate, at all events when they pass through the Menai Straits.

But, notwithstanding the view which I expressed at the beginning of my judgment as to the two points made by Mr. Warmington, and my view that we cannot find within the four corners of the Acts sufficient to enable us to say that the rates for loading and unloading "within the limits of the said port of Carnarvon" are plainly imposed on those who load or unload

(1) 2 B. & Ad. 43, 58.

C. A. 1905 ASSHETON SMITH v. OWEN. Vaughan Williams L.J.

goods at Port Dinorwic, it has yet to be considered whether the construction of the Acts is not affected by the evidence which shews the view which has been taken and acted on by all persons concerned since those Acts were first put into operation.

Upon this question there are, in my opinion, two classes of the evidence given which are admissible. First we have the question, what is the port of Carnarvon? There is no definition of it in the Acts, and, as I have already said, I do not think that the definition in the certificate given by the Commission issued under the Act 13 & 14 Car. 2, c. 11, either determines or in any way affects this question of the definition of the limits of the port.

In the absence of any definition, it seems to me that evidence is admissible to shew what was reputed amongst the officers administering the Acts of 33 and 49 Geo. 3 in past times to be the port of Carnarvon.

The evidence may not be of great weight, unless coupled with proof of acts done which could not have been done had not the limits of the port accorded with the reputation; still, as the question of the limits of the port within which the trustees of the harbour were accustomed to act is a question of fact of public interest, I think that evidence of public reputation as to those limits is admissible for what it is worth.

Evidence was in fact given of acts done by the trustees under the powers of these Acts outside what, according to the widest possible meaning of "port" in its popular and local sense, could be said to have been done "within the limits" of the local port.

With one exception, none of the acts done in times past by the trustees or their officers were in the nature of collection of rates in respect of the loading or unloading of vessels outside the limits of the port of Carnarvon in its widest sense as a local port —as a port situate upon the Menai Straits—but were acts done for the purpose of rendering the navigation of vessels going to or coming from the port of Carnarvon more safe, and were principally acts done above or beyond the bar at the southern end of the Straits to the south of Carnarvon. The one exception is the port of Dinorwic itself, as to which it was proved that the trustees for many years collected rates without opposition in

respect of vessels loading and unloading outside what could be considered the limits of the local port of Carnarvon in its widest popular sense. And it is urged that this fact may not only be evidence of reputation, but may also be evidence of a contemporanea expositio, shewing that the Acts have always been applied to a port in the position of Port Dinorwic which is far outside the limits of the local port.

On the whole, I think that the fact of the collection of these rates from people well able to resist an unjust imposition, a collection which seems to have been made not only from Mr. Assheton Smith and his predecessors, the owners of the Vaynol Estate, but also from vessels not owned by him which came into or went out of Port Dinorwic to load or unload, is very material.

If this were a question of estoppel as between the trustees of the harbour and the owners of Vaynol it could have no effect on the construction of the Acts. But I do not so regard it. Of course, if the same thing had happened without objection at ports other than Port Dinorwic there can be no doubt it would amount to a contemporanea expositio, or at all events to evidence of the existence of facts raising a strong prima facie ground for thinking that there must be some legal ground on which those who submitted to pay the rate could not resist.

Lord Blackburn in *Clyde Navigation Trustees* v. *Laird* (1) said: "There is only one other point on which I shall say anything. The trustees have ever since the passing of the Act of 1858 down to the commencement of this suit, a period of eighteen years, been in the habit of levying rates and dues on timber floated to yards on the upper part of the Clyde, and the timber merchants, an acute and wealthy body, by no means inclined to pay money gratuitously, or to shrink from litigation, have submitted and paid them. I think that raises a strong prima facie ground for thinking that there must exist some legal ground on which they could not resist. And I think a Court should be cautious, and not decide unnecessarily that there is no such ground. If the Lord President means no more than this when he calls it 'contemporanea expositio of the

(1) (1883) 8 App. Cas. 658, 670.

C. A. 1905

ASSHETON SMITH v. OWEN.

Vaughan Williams L.J.

statutes which is almost irresistible,' I agree with him. I do not think he means that enjoyment, at least for any period short of that which gives rise to prescription, if founded on a mistaken construction of a statute, binds the Court so as to prevent it from giving the true construction. If he did I should not agree with him, for I know of no authority, and am not aware of any principle for so saying."

It is true that Lord Blackburn was there speaking of a practice existing ever since the passing of the Act then in question, and there is no direct evidence that the practice of the collection of these rates has existed ever since the passing of the Act of 1793; but I should infer from letters written by or on behalf of the late Mr. Assheton Smith, when of full age and as a minor, that such had been the fact, at all events ever since Dinorwic had been used as a port for the loading of slates, and there is no evidence before us to prove that it was not so used at the time of the passing of the first Act. On the contrary, there is evidence in the books of the trustees put in by the defendant shewing that these payments to the harbour trustees of dues for slates go back as far as November 21, 1839, and letters of July 22, 1874, written by the agents of Mr. Assheton Smith state "that by the Acts of Parliament 33 Geo. 3 and 49 Geo. 3, the harbour trustees have always levied tolls on goods shipped and unshipped at Port Dinorwic, without reference to the arrangement made between Her Majesty's Commissioners of Woods and Forests and Mr. Duff Assheton Smith," and again, "the amount hitherto paid by Mr. Duff Assheton Smith has varied from 300*l.* to 400*l.* a year."

I infer from the above statements, treating them merely as evidence in the action and not as raising any estoppel, that the trustees have always levied tolls upon goods shipped and unshipped at Port Dinorwic and ever since the passing of the Acts. And I do not regard this statement as limited to vessels owned by or slates shipped by Mr. Assheton Smith. And I think that in the light of this practice, we ought to hold that the words "within the limits of the said port of Carnarvon" in the sections relating to the loading and unloading of vessels within the limits of the said port, whether those words do or do not extend to the whole

customs port, extend at least to an area which covers Port Dinorwic.

I agree with the judgment of Stirling L.J., which I have had an opportunity of reading, upon the other point raised, viz., whether the port extends to water more inland than the original high-water mark which is artificially connected with the sea.

In my opinion this appeal ought to be dismissed with costs.

STIRLING L.J. I have—though not without hesitation and doubt—arrived at the conclusion that the decision of Kekewich J. ought to be affirmed. Two questions arise. The first is, what is the meaning of the word "port," as used in those sections of the two Acts (33 Geo. 3, c. cxxiii. and 49 Geo. 3, c. xxiv.) which imposed certain rates or duties upon ships or vessels loading or unloading "within the limits of the port of Carnarvon." Does it mean the local port, whose limits are not very accurately defined, but include at most the harbour of Carnarvon and a mile or two of the immediately adjacent coast? Or does it mean the fiscal port, whose limits have been strictly defined and extend over many miles of coast? I must admit that these Acts, particularly the earlier, are so expressed as to give ample room for argument on either side; but, after full consideration, it seems to me that the latter is with sufficient certainty indicated as the true meaning. I agree with much of what is said in the judgment of Kekewich J., and I will indicate briefly those matters which have chiefly weighed with me. The two statutes are in pari materia and ought to be read together. The second, which followed the first at an interval of about sixteen years, may, I think, be properly used for the purpose of throwing light on the meaning of the first. It is in any view the more important for the present purpose, for it contains the enactments by which the rates and duties now leviable were imposed. Sect. 7 of that Act provides (reading it shortly) that "no . . . . officer of the customs whatsoever belonging to the port of Carnarvon, within the port of Chester," (that is unquestionably the fiscal port) "shall at any time . . . . give or make out any cocket or other discharge . . . . or permit any . . . . vessel to come in or go out of the said harbour, or from any landing place within the limits

C. A. 1905 — ASSHETON SMITH v. OWEN. — Stirling L.J.

of the said port, until the master or owner . . . . shall produce a certificate from the collector . . . . to be appointed in pursuance of this Act, that the rates or duties by this Act granted are paid or secured to be paid." That section therefore casts on the customs officers of the fiscal port, whenever and wherever acting in the collection of the public revenue, the duty of seeing at the same time that the rates and duties imposed by these private Acts are paid or secured. The limits within which those custom house officers perform their duties are those of the fiscal port; it seems to me a strong indication that the limits within which the rates and duties are to become payable were intended to be regarded as the same. Again, s. 15 of the same Act empowers the trustees to remove "all, every, or any of the rocks at the Swellies, or in any other part of the Straits" (of Menai) "within the said port of Carnarvon, for the more safe passage of ships and vessels to and from the said harbour, and through the said Straits." The "rocks at the Swellies" there referred to as being "within the said port of Carnarvon," lie within the limits of the fiscal port, but are far outside those of the local port of Carnarvon. It is said that the expression "limits of the said port" does not occur in that section, but I am unable to attach any weight to this circumstance. I may point out in this connection that by s. 5 it is enacted that "there shall be paid by every person whomsoever who shall lade or unlade . . . . any . . . . article, matter or thing whatsoever within the said harbour of Carnarvon, or within the limits of the said port, ... any sum or sums of money not exceeding the several rates and duties mentioned and contained in the second schedule . . . . marked 'B.'" When that schedule is referred to, it is found to be headed "Rates and dues to be paid for landing and shipping of goods, wares and merchandize in the port of Carnarvon," the word "limits" being omitted. This position appears to me to be confirmed by the observation that the trustees appointed by the Act are charged with many duties (besides those imposed by s. 15 of the Act) outside the limits of the local port; as for example, the laying and fixing of buoys and beacons upon the bar (first Act, s. 8), and the erection of a lighthouse at Llandwyn Point (s. 9); and that

rates and duties are imposed in respect of ships (whether belonging to foreign or British subjects) which pass through the Menai Straits (lying without the local port), even although they do not load or unload within the limits of the port.

I agree with Kekewich J. in thinking that the performance of those duties confers benefits in which the plaintiff participates, and which the rates and duties imposed by the Acts were intended to remunerate.

The second question is of a different kind. Docks and quays have since the passing of the later of the two Acts been constructed by the predecessors in title of the plaintiff on lands belonging to him, situate at some distance inland from the extreme high-water mark at the times of the passing of these Acts. The docks are connected with the sea by a short canal and lock, by which at high water ships can enter and go out to and from the dock, from and to the sea. It is contended that the docks and quays so constructed are not within the "limits of the port," however wide those limits may be.

Much stress was laid on the fact that the land on which these new docks were erected was the property of the plaintiff's predecessor in title who constructed them.

It would seem that in some circumstances this might be a material consideration.

Lord Hale, in his treatise De Portibus Maris, c. 3 (Hargrave's Law Tracts, vol. i. p. 53), says: "Any man might bring and unlade his own private goods, which are not customable, in his own private ship or vessel upon his own land, as fish taken by Englishmen; for this was no accroachment of a port at common law, and fish are excepted out of the statute of 1 Eliz. c. 11."

This statement of the law may still be perfectly accurate with respect to land within a port held simply in right of the Crown or under a title arising by prescription or under a Royal charter; but we have here to deal with a case in which duties are claimed under statutes, which impose duties in respect of goods laden or unladen "within the limits of the port." I do not think that the owner of land abutting on the harbour of Carnarvon (and therefore within the limits of the port in the narrowest sense) could escape from the duties so chargeable on his non-customable

C. A. 1905 ASSHETON SMITH v. OWEN. Stirling L.J.

goods laden or unladen upon that land on or from his own private vessel: the language of the Acts seems to me to afford no ground for such an exemption. Nor, as it seems to me, could such an owner escape if the ship were laden or unladen, not in the harbour itself, but in a dock constructed on the land at some distance from the harbour but connected with it by a canal or lock such as that which was made by the predecessor in title of the present plaintiff. If the owner had removed the soil of his land, so as to bring into immediate contact with the sea land which had ever before been separated from it by a wide interval, it seems to me that he would by his own act have enlarged the limits of the port, and what has been actually done here appears to be in substance the same thing.

On this part of the case no authority was cited by counsel on either side, nor has any been subsequently discovered.

I will only add that the rates and dues were paid by the plaintiff's predecessors in title, in respect of ships laden or unladen at Port Dinorwic, without dispute for a long period and down to a time shortly before the bringing of this action. This circumstance, though it may not preclude the plaintiff from questioning the right to levy the rates or dues, yet, as was pointed out by Lord Blackburn in *Clyde Navigation Trustees* v. *Laird* (1), may well render the Court cautious in holding that such a right does not exist.

In these circumstances I think that the appeal fails, and ought to be dismissed.

COZENS-HARDY L.J. The question which arises for decision in this appeal turns upon the construction of two ill-drawn and obscure Acts of Parliament passed in 1793 and 1809. The late Mr. Assheton Smith built on his own land certain docks at Port Dinorwic, which is within the limits of the fiscal port of Carnarvon, as they were defined in 1723. Port Dinorwic is about four miles north of Carnarvon, on the east side of the Menai Straits, and a little to the south of the Swelly Rocks, which are the northern boundary of the fiscal port of Carnarvon. The trustees of Carnarvon Harbour assert that Port Dinorwic is

(1) 8 App. Cas. 670.

within the limits of the port of Carnarvon referred to in the Acts of 1793 and 1809, and that the statutory rates or duties imposed by those Acts are payable on goods loaded or unloaded on or from vessels at Port Dinorwic. It is proved or admitted that these rates and duties have been paid without protest for very many years, and I think the proper inference is that they have been so paid ever since the Acts came into operation. This is a fact which must not be overlooked, though I do not think the doctrine of contemporanea expositio can properly be applied in construing Acts which are comparatively modern. The plaintiff contends that the words "port of Carnarvon" are used in the Acts in the sense of the popular and commercial port, which is either identical with the harbour of Carnarvon, or at the utmost includes in addition only a small area of the sea adjacent to the harbour. I think it is impossible to deny that the word "port" is used sometimes in the larger sense, and sometimes in the narrower sense, and I have felt great difficulty in arriving at a satisfactory conclusion as to the meaning of the word in the rating or charging sections. I do not propose to go through the Acts in detail. But I approach the subject having regard first to the language used, whenever it is clear, and secondly to the question whether any benefits are conferred upon Port Dinorwic as a consideration for the rates and duties. Sect. 16 of the Act of 1793, which for the present purpose is identical with Sched. (A) of the Act of 1809, is the charging section. It uses, throughout, the words "within the limits of the said port," a phrase which is apt to describe the fiscal port, which has known and defined limits, but which is not a natural phrase to describe the commercial or popular port of Carnarvon, the limits of which are undefined and unascertained. This view is strongly supported by s. 7 of the Act of 1809, a section which is in aid of the charging section. Its reference to the fiscal port is unambiguous. It imposes upon the officers of the fiscal port the duty of preventing any ship coming from (inter alia) "any landing place within the limits of the said port," words which precisely hit Port Dinorwic, until a certificate has been produced that the rates or duties granted by the Act have been paid or secured to be paid. Upon the whole, I think the

C. A. 1905

ASSHETON SMITH v. OWEN.

Cozens-Hardy L.J.

construction of the charging section contended for by the trustees is the more natural and reasonable construction.

But can it be said that any benefits are conferred upon Port Dinorwic or upon any place within the limits of the fiscal port except Carnarvon? I think this question must be answered in favour of the trustees. In so far as vessels approach Port Dinorwic from the south, they get the benefit—(1.) of the scouring of the bar, (2.) of the buoys in the Straits right up to Dinorwic, (3.) of the lighthouse at Llandwyn Point. In so far as vessels approach Port Dinorwic from the north, they get the benefit—(4.) of the blasting or removing of the rocks at the Swellies, and (5.) to a lesser extent of the buoys or beacons placed to the north of Dinorwic. Moreover the Acts themselves seem to assert that there is a benefit not confined to vessels using the harbour of Carnarvon, for there are passing tolls payable by vessels going through the Straits without touching at any landing place. It is doubtless true that Carnarvon reaps larger benefits than Port Dinorwic, but I do not think equality of benefits can be essential. The result is that, in my opinion, the judgment of Kekewich J. on this part of the case was correct.

A second and subordinate point was raised by the plaintiff. It was argued that, even assuming the rates are payable in respect of vessels loading or unloading at Port Dinorwic, in so far as Port Dinorwic is within the limits of the fiscal port of Carnarvon, as they had been defined before 1793, those limits do not extend to a dock or quay subsequently constructed by the predecessor of the plaintiff on his own land beyond the line of high water in 1793 and 1809. Upon consideration I think this argument cannot prevail. It is clear that exemption cannot be claimed simply on the ground that goods are loaded or unloaded by the plaintiff on his own land adjacent to the sea. And if by artificial means, such as the construction of a dock, the line of high tide is carried further inland, I think the limits of the fiscal port must follow that line. All land adjacent to the sea must be in some fiscal port, and I cannot suggest any port except Carnarvon within which the Port Dinorwic docks can be situate. In other words, I think the limit of the fiscal port of Carnarvon must be the present high-water mark.

I may add that I am not satisfied that the plaintiff has adduced sufficient evidence that high-water mark in 1809 did not extend to the present dock and quay, but in the view which I take this is not material. I agree with the judgment of Kekewich J. on both points, and I think the appeal must be dismissed with costs.

It was agreed between the parties that there should be a stay of execution pending an appeal to the House of Lords.

VAUGHAN WILLIAMS L.J. I understand that a declaration of immunity from tolls is not claimed by the plaintiff with regard to vessels passing to Port Dinorwic from the south end of the Menai Straits.

Danckwerts, K.C. That question does not arise in this action.

Solicitors: *Hasties; Rooke & Sons, for C. A. Jones, Carnarvon.*

W. L. C.

C. A.
1905
Dec. 4, 5.

In re BENETT.
WARD *v.* BENETT.

[1903 B. 4708.]

Trustee and Cestui que Trust—Sole Surviving Trustee—Legal Personal Representative—Breach of Trust—Debt due to Trust Estate—Insolvent Estate—Right of Retainer—Obligation to Retain—New Trustees, Appointment of—Cestuis que Trust, Rights of.

The legal personal representative of a sole surviving trustee who has died insolvent and indebted to his trust estate, cannot, unless he has elected to act as trustee or is otherwise in the position of trustee, be ordered to exercise, in favour of the cestuis que trust, his right of retainer in respect of the debt.

H. appointed two trustees of her will, and declared that all the trusts and powers thereby reposed in them might be exercised by the survivor or his heirs, executors or administrators, or other the trustee or trustees for the time being. B., one of the trustees, survived his co-trustee and died insolvent, intestate, and having committed a breach of trust in respect of which his estate was indebted to the H. estate. B.'s widow took out administration to his estate, and then appointed new trustees of H.'s will under a power therein contained; and from time to time, as portions of the H. estate came to her hands, she transferred them to the new trustees.

Judgment for the administration of B.'s estate having been pronounced in an action brought by a creditor, the new trustees applied by summons in the action for an order on the administratrix to exercise her right of retainer in their favour as trustees of H.'s will, she having declined to to do so or to act in any way in the trusts:—

Held, that, as the administratrix was neither a trustee of the will nor had in any way accepted the trusts, she was not under any obligation to exercise her right of retainer in favour of the trustees or beneficiaries under H.'s will.

Whether, in any case, after the appointment of new trustees, the right of retainer continued to be exercisable, *quære*.

Fox v. *Garrett*, (1860) 28 Beav. 16; and *In re Owen*, (1889) 23 L. R. Ir. 328, disapproved.

Sander v. *Heathfield*, (1874) L. R. 19 Eq. 21; and *Re Faithfull*, (1887) 57 L. T. 14, distinguished.

In re Ridley, [1904] 2 Ch. 774, approved.

Decision of Buckley J. reversed.

Elizabeth Horne, spinster, by her will dated January 8, 1891, appointed Charles Henry Benett and another her trustees and

executors; and after a gift to them of her residuary estate upon trusts for the persons therein named, she declared that all the trusts and powers thereby reposed in her said trustees might be exercised by the survivor of them, or the heirs, executors, or administrators of such survivor, or other the trustee or trustees for the time being of that her will; and the will contained a power for the continuing trustees for the time being, or for the executors or administrators of the last acting trustee, to appoint a new trustee or new trustees.

The testatrix died on March 7, 1891, and her will was proved by both executors.

C. H. Benett survived his co-trustee and died on June 28, 1903, intestate and insolvent, and on July 25, 1903, administration to his estate was granted to his widow, Edith Pearce Benett.

C. H. Benett, while sole surviving trustee of the will, wrongly invested and also misappropriated part of the trust estate, so that at his death a sum of upwards of 14,000*l.* was due from him to that estate.

On December 7, 1903, judgment was pronounced in the usual form for the administration of Benett's estate in the above action, which was a creditor's action against his widow as his legal personal representative.

By a deed dated November 30, 1903, the widow, under the power given by E. Horne's will, appointed two new trustees of the will in the place of the two deceased trustees; but the deed did not go on to contain the usual declaration vesting the trust estate in the new trustees.

On February 25, 1904, the new trustees, at the instance of the beneficiaries under the will, required the widow to claim as a creditor upon her deceased husband's estate for the sum they claimed to be due from his estate to that of the testatrix, and also to exercise in their favour as trustees the right of retainer which they maintained she possessed as legal personal representative of the surviving trustee of the will; but this she declined to do, on the ground that she had never accepted the trusteeship of the will, had never in any way acted as trustee thereof, and that she was under no obligation to exercise any such right of retainer. Thereupon, on January 10, 1905, the new trustees took

C. A. 1905

BENETT, *In re.* WARD *v.* BENETT.

out a summons in the action to have it determined whether or not it was the duty of the defendant, as legal personal representative of C. H. Benett, the sole surviving trustee of E. Horne's will, to prove in the action as a creditor upon Benett's estate in respect of the moneys belonging to the Horne estate which were in his hands at the date of his death, or in respect of which he was then indebted to or otherwise liable to account to the testatrix, and in respect of interest thereon since her death, or in respect of some and which of such moneys and interest, and that the defendant might be directed to prove in this action for the moneys aforesaid; and if she should be so directed to prove, that it might be determined whether or not the defendant was entitled to exercise for the benefit of the applicants a right of retainer over the assets belonging to Benett's estate in respect of the moneys aforesaid, or in respect of some and which of such moneys, and that she might be directed to exercise such retainer, if entitled so to do.

The plaintiff and the defendant were the respondents to the summons.

It appeared that at the date of the appointment of new trustees the affairs of C. H. Benett were in such confusion that the exact particulars of the trust estate of E. Horne were unknown, and it was therefore considered advisable that, instead of inserting a vesting declaration in the deed of appointment, the various items should be assigned and transferred to the new trustees as they were from time to time ascertained, and this was accordingly done as to all the items which came into the hands or under the control of the defendant, the widow, except her right of proof and retainer as against her deceased husband's estate.

On September 3, 1903, the defendant's solicitors had paid a premium of 17*l.* to prevent the forfeiture of a life policy of the Royal Exchange Assurance on the life of one of the beneficiaries under E. Horne's will, which had been assigned to C. H. Benett on July 10, 1898, as security for a sum of 600*l.* advanced by him to that beneficiary out of the trust estate. It was not known at the time whether the policy belonged to the Horne estate or to Benett's estate.

The summons was heard on March 29, 1905, by Buckley J.,

who held that the payment of the insurance premium of 17*l.* by the defendant's solicitors constituted an acceptance by her of the trusts of the will, and made an order declaring that, as legal personal representative of the intestate, Benett, she was bound to prove in the action as a creditor upon his estate in respect of the moneys belonging to the Horne estate, and to exercise her right of retainer in favour of the applicants as trustees of the will of Elizabeth Horne; and she was ordered to prove in the action and exercise her right of retainer accordingly, but without prejudice to her exercising any other right of retainer she might have.

From that order the plaintiff and the defendant appealed.

The notice of appeal asked that, in lieu of that order, the new trustees might be admitted as creditors upon Benett's estate in respect of the moneys belonging to the Horne estate which were in his hands at the date of his death, or in respect of which he was then indebted to or otherwise liable to account to the estate of the testatrix and in respect of interest thereon since his death.

The appeal was heard on December 4 and 5, 1905.

Norton, K.C., *F. Thompson*, and *G. Henderson*, for the appellants. It is contended: (1.) That Mrs. Benett never was a trustee of Horne's will; she never acted as such and has always refused to do so. As the legal personal representative of her husband, the last surviving trustee, only a quasi bare legal estate vested in her. The Court cannot compel her to act as trustee against her will. The most the Court can do is to order her to assign the trust estate to new trustees properly appointed or their nominee. It cannot be that an executor or administrator is bound to accept all the trusts of which his testator or intestate was a trustee: *Legg* v. *Mackrell* (1); *In re Ridley* (2); *Greenwood* v. *Wakeford* (3); *Aldridge* v. *Westbrook.* (4)

Buckley J. was of opinion that by paying the insurance premium Mrs. Benett accepted the trusts. It is submitted that that payment did not amount to an acceptance. At that time it was not known whether the policy formed part of the Horne

(1) (1860) 2 D. F. & J. 551, 553.
(2) [1904] 2 Ch. 774.
(3) (1839) 1 Beav. 576.
(4) (1841) 4 Beav. 212.

C. A. 1905 — BENETT, *In re.* WARD *v.* BENETT.

trust estate or not. At all events, assuming it did, it was an unauthorized investment, and the beneficiaries might have repudiated it; and until they accepted it, it could not be treated as forming part of the trust estate. If Mrs. Benett has, in fact, accepted the trusts, the deed appointing new trustees is invalid, because she has appointed new trustees in place of the deceased trustees, not in place of herself.

(2.) But assuming that Mrs. Benett has become a trustee of the Horne estate, still it is submitted that the Court will not order an executor to exercise his legal right of retainer. Courts of Equity have always recognized the existence of this legal right, though the judges have often said that it produces unjust and unfair results, as being contrary to the equitable doctrine of equality among creditors. The Court cannot prevent the exercise of this legal right when it exists, but it is quite a different thing to order an executor to exercise his right of retainer so as to give a priority to one class of creditors, when he does not desire to do so. Buckley J. relied on two cases—*Fox* v. *Garrett* (1) and *Sander* v. *Heathfield*. (2) As to *Fox* v. *Garrett* (1), that case is distinguishable from the present, for there the two estates, the creditor estate and the debtor estate, were being administered by the Court. The same person was administrator to both estates. A debt was due from one estate to the other, and the administrator doubted whether he could retain the debt out of the assets of the estate which was indebted: at all events, he declined to do so except under the order of the Court. Lord Romilly M.R. directed the administrator to retain the debt. If, however, that case be not distinguishable from the present, it is at any rate not binding on the Court of Appeal. Moreover, in that case the administrator had voluntarily accepted the trusts. In *Sander* v. *Heathfield* (2) counsel for the administratrix argued in support of, not against, the right of retainer.

[STIRLING L.J. referred to *In re Wells*. (3)]

That case only decided that the Court would not interfere to prevent an executor from exercising his legal right of retainer. Under the old law before the Judicature Act the persons

(1) 28 Beav. 16. (2) L. R. 19 Eq. 21.
(3) (1890) 45 Ch. D. 569.

beneficially entitled to the money could have obtained leave, on giving a proper indemnity, to sue in the name of the legal owner. Mrs. Benett has always been willing to assign the property, and the beneficiaries are not entitled to be placed in a better position than if an assignment had been executed. A Court of Equity does not regard with favour an executor's right of retainer: *Trevor* v. *Hutchins*. (1)

Upjohn, K.C., and *Elgood*, for the Horne beneficiaries. It is admitted that the right of retainer exists, but it is said the administratrix cannot be compelled to exercise it for the benefit of the cestuis que trust. It is in effect said that the administratrix has an option, and can therefore at her election alter the rights of the beneficiaries. An executor's right of retainer is not affected by s. 10 of the Judicature Act, 1875: *Lee* v. *Nuttall* (2); nor by s. 3 of the Married Women's Property Act, 1882: *In re Ambler*. (3) And the same thing has been decided with regard to other statutes. Even assuming that Mrs. Benett has not accepted the Horne trusts, so as to become a trustee in the fullest sense of the word, and that she is not bound to perform all the duties of the original trust, still it is submitted that she is bound to exercise for the benefit of the beneficiaries, when they call upon her to do so, every legal right which is vested in her as the representative of the last surviving trustee. For, instance, they can call upon her to exercise, if necessary, the statutory right of setting up the Statute of Limitations against any creditor of the deceased trustee whose claim is statute-barred. If a debtor to a trust estate were himself the last trustee, he could not sue himself to compel payment of the debt; in such a case the common-law right of retainer is a substitute for the right to sue. The beneficiaries could not call on the trustee to sue himself, but they could call on him to exercise his legal right of retainer in their favour. His doing so would not necessarily imply that he accepted the trusts.

[COZENS-HARDY L.J. I am not satisfied that this is a legal right. The debt due from the deceased trustee, Benett, was an equitable debt which the new trustees could undoubtedly have recovered

(1) [1896] 1 Ch. 844. (2) (1879) 12 Ch. D. 61.
(3) [1905] 1 Ch. 697.

C. A. 1905 — BENETT, *In re.* WARD *v.* BENETT.

in the old Court of Chancery, and they could have required his representative either to admit assets or submit to an administration decree.]

No doubt the claim could have been enforced in Chancery, if not at law. If the intestate's estate had been solvent it would have been the duty of the administratrix to hand over the trust moneys to the new trustees; what difference can it make that the estate happens to be insolvent? Of course, if the intestate were trustee for other trust estates, those estates would be entitled to share in the money retained, but as against the simple contract creditors the principle would be the same. This view is in accordance with all the cases cited except *In re Ridley*. (1) In *Legg* v. *Mackrell* (2) the plaintiff was seeking to compel the executrix of the deceased trustee to perform the trusts, which was an entirely different thing. It is conceded that the representative of the last surviving trustee is not bound to take upon himself the performance of the trusts. The question is, what are the duties of a representative trustee? It is submitted that his duty extends beyond the mere transfer of the trust funds. In such a case as the present, in which there could be no right of action at law for the trust fund, because the same person would be both plaintiff and defendant—representative of both the trust estate and the trustee's own estate—it is submitted that a Court of Equity would always have directed the representative to exercise his legal right of retainer as a substitute for the right to sue.

[STIRLING L.J. The representative of the trust estate could obtain administration of the trustee's estate by the Court.]

Execution at law would give priority which would not be given by an administration decree. It is submitted that a trustee, and equally so the representative of a last surviving trustee, is bound to make use of his legal rights for the benefit of the beneficiaries. In *Fox* v. *Garrett* (3) Lord Romilly M.R. treated this as a matter of course. No doubt the present case raises the question whether *Fox* v. *Garrett* (3) and *Sander* v. *Heathfield* (4) were rightly decided.

(1) [1904] 2 Ch. 774.
(2) 2 D. F. & J. 551.
(3) 28 Beav. 16.
(4) L. R. 19 Eq. 21.

[VAUGHAN WILLIAMS L.J. A note on p. 978 of the 6th edition (1867) of Williams on Executors, after citing certain authorities on the right of retainer, concluding with *Fox* v. *Garrett* (1), continues thus: "in which last case both estates were being administered by the Court, and it was held that the administrator was bound so to retain at the instance of the parties interested in the creditor's estate." I observe that this note is reproduced on p. 795 of the 10th edition.

STIRLING L.J. Take the simple case of a sole surviving trustee dying insolvent and having committed a breach of trust. Suppose his personal representative has, as you say, a right of retainer. Do you say that it is a breach of duty on the part of that legal personal representative towards the beneficiaries if he refuses to exercise that right of retainer at their request?]

We say it is his legal duty in such a case to do so.

[STIRLING L.J. I can understand that, if the legal personal representative is in fact a trustee. Apart from that, I see great difficulty in your contention.]

Suppose a legal chose in action is vested in the representative of the surviving trustee: though he may say that he refuses to become trustee in the sense, for example, of exercising powers of advancement, and so forth, yet the beneficiaries are entitled to say that, although he is not under any duty to exercise all the trusts, it is his duty to get in the debt due to the trust estate. He is bound to exercise his existing legal rights by getting in the debt and then paying it either to the parties beneficially entitled or into Court. If the debt is vested in the representative of the surviving trustee, and that representative is also the representative of the debtor to the trust estate, then the right which he is bound exercise for the benefit of the trust estate is the right of retainer.

[STIRLING L.J. referred to *Davies* v. *Parry* (2), approved in *In re Belham.* (3)]

In *Fox* v. *Garrett* (4) Lord Romilly M.R. says that the persons entitled to the estate to which the debt is owing have a right to insist on the retention being made by the debtor's representative, which shews that if that right is contravened he is under some

(1) 28 Beav. 16.
(2) [1899] 1 Ch. 602.
(3) [1901] 2 Ch. 52.
(4) 28 Beav. 18.

C. A. 1905 — BENETT, *In re.* WARD *v.* BENETT.

liability. In *Sander* v. *Heathfield* (1), although the precise point now before the Court did not arise because there the power to retain had already been exercised, yet the opinion of the Vice-Chancellor, which is correctly stated in the head-note, is in accordance with our view. And that case was followed by Chitty J. in *Re Faithfull.* (2) Then *Fox* v. *Garrett* (3) was followed in Ireland in *In re Owen.* (4) It is submitted that it can make no difference in principle whether the one estate is being administered or both. An executor is in a position of greater freedom than a person in the position of a trustee, and if, as the cases shew, an executor is bound to exercise his right of retainer, a fortiori a trustee is bound to do so.

The only decision against us is *In re Ridley* (5), but it is submitted that the decision cannot be regarded as satisfactory, for Joyce J. does not deal with the cases, and therefore does not say that he is bound by authority. Upon the whole, it is submitted that the beneficiaries here were and are entitled to call on Mrs. Benett to retain in their favour, even though she may not have accepted the trusteeship. In fact, by the terms of the will, a duty as trustee was cast upon her just as on Benett himself. And moreover, she deliberately retained in her hands this power of retainer, and she must be taken to have been aware of the obligation imposed upon her by law. And further, she deliberately executed an appointment of new trustees which omitted the usual vesting declaration, though knowing that under s. 10, sub-s. 2 (*d*) of the Trustee Act, 1893, she was bound to do what was necessary for vesting every part of the trust property in the new trustees.

Norton, K.C., in reply. *Fox* v. *Garrett* (3), if not wrongly decided, is distinguishable on the grounds already stated. In *Sander* v. *Heathfield* (6) it is clear that the legal personal representative had already accepted the trusts, and a distinction is there drawn between "legal personal representative" and "trustee." The dicta there relied upon by the respondents in the present case were really irrelevant to the question for decision.

(1) L. R. 19 Eq. 21.
(2) 57 L. T. 14.
(3) 28 Beav. 16.
(4) 23 L. R. Ir. 328, 332.
(5) [1904] 2 Ch. 774.
(6) L. R. 19 Eq. 26.

In *Re Faithfull* (1), Chitty J., though following *Sander* v. *Heathfield* (2), evidently did so with difficulty. I submit that Mrs. Benett, not being a trustee, was not bound to do anything more than to hold the property for the proper person. The moment she exercised the right of retainer over a fund in her hands she would become a trustee as regards the claim of the beneficiaries on that particular fund, retainer being in itself an acceptance of the trust.

VAUGHAN WILLIAMS L.J. The real question we have to decide in this case is whether the decision of Buckley J. is right, or whether the decision of Joyce J. in *In re Ridley* (3) is right.

Now, the question that has been raised upon the facts is whether Mrs. Benett did anything by way of acceptance of the trusts of the will of Elizabeth Horne of which her deceased husband was trustee. In my judgment, and in the judgment of my learned brethren, she did nothing whatever in the way of acceptance of those trusts. Then, in that state of things, the question arises whether the beneficiaries who are entitled under those trusts of which the deceased, C. H. Benett, was trustee can come to the Court and insist upon Mrs. Benett, as the legal personal representative of her deceased husband, exercising the right of retainer for their benefit, she not having in any way accepted the position of trustee which her husband formerly held. Now, I do not think I need go at length into the question of what are the rights of the personal representative of a deceased trustee as regards declining to accept the position and duties of trustee held by his testator. The case of *Legg* v. *Mackrell* (4) shews—whether you look at the judgment of Lord Campbell in the Court of Appeal, or at the judgment of the Vice-Chancellor in the Court below—that such a personal representative of a deceased trustee has an absolute right to decline to accept the position and duties of trustee if he chooses so to do.

That being so, we have to consider the question whether these beneficiaries under the will of the testatrix have a right to call upon the personal representative of the deceased trustee, Benett,

(1) 57 L. T. 14.
(2) L. R. 19 Eq. 21.
(3) [1904] 2 Ch. 774.
(4) 2 D. F. & J. 551.

C. A. 1905 — BENETT, *In re.* WARD *v.* BENETT. — Vaughan Williams L.J.

to exercise the right of retainer in their favour. It has been said, and with a good deal of reason, that the question was determined by Lord Romilly M.R. in *Fox* v. *Garrett* (1), and also by Malins V.-C. in *Sander* v. *Heathfield*. (2) With regard to the latter of those cases, *Sander* v. *Heathfield* (2), when one looks at the facts of that case, it is plain that the Vice-Chancellor did not really have this question to decide, because, upon the facts, what he had to decide was whether the beneficiaries had the right to insist upon the application, in accordance with the trust, of the moneys retained. It was a case in which the right of retainer had already been exercised, and therefore it does not, to my mind, stand at all in the way of a decision in accordance with the views of Joyce J. in *In re Ridley*. (3)

Then, with regard to the case of *Fox* v. *Garrett* (1), that was a case in which, in point of fact, there were two estates both being administered by the Court, and possibly the ground of decision there was this very fact that the two estates were being administered by the Court; for Lord Romilly may have taken the view that, where both estates were being so administered, the Court had a right to deal with the matter in a manner in which it would not otherwise have done. But I confess that I do not myself feel quite certain that the real ground of the decision was that both estates were being administered by the Court. However, the view that that was a material circumstance which the Court took into consideration in *Fox* v. *Garrett* (1) is somewhat confirmed by a note, to which I referred during the argument, in the 6th edition of Williams on Executors (vol. ii. p. 978), published in 1867, seven years after the decision, and repeated in the present edition—the 10th, vol. i. p. 795. There the author seems certainly to have taken the view that the fact that both estates were being administered by the Court was to a considerable extent the ground of the decision. However, whether that decision can be so explained or not, it is necessary for us to consider whether the case was rightly decided, and, so far as I am concerned, I think it was not. Everyone agrees that the right of retainer is a legal right, and not very long after the

(1) 28 Beav. 16. (2) L. R. 19 Eq. 21.
(3) [1904], 2 Ch. 774.

principle had been thoroughly established the question arose whether, with regard to a debt which was due to the executor, but in which he himself had no beneficial interest (though his legal interest was admitted), the right of retainer could be exercised in favour of the persons beneficially interested; and what was held was that the legal right of retainer which was vested in the executor was in no way affected by the fact that when he had retained and had thus received his debt due to him from his testator's estate, he would have to hold it and distribute it in accordance with the requirements of that trust of which his testator had been trustee. That being so, it seems to me that the proper statement of the result arrived at in that case is that the right of an executor to retain is not a right which he holds on trust, but is a personal privilege of his own, a privilege which was given to him by the common law because the acceptance of the office of personal representative of a deceased person put him in a position which was disadvantageous to him as compared with other creditors of the deceased. He could not sue himself, and he could not have the advantage of being the first to sue, and so in the circumstances he was awarded by the common law the privilege of retainer. If the earlier cases upon the right of retainer are looked at, it will be found that the right is always spoken of in them as a "privilege." I have taken the opportunity of looking at earlier editions of Williams on Executors in which the author deals with this right of retainer, and I observe that there is a good deal in them upon the subject which does not appear in later editions; but in all the passages dealing with the right of retainer Sir Edward Vaughan Williams speaks of it as a "privilege," and the authorities to which he refers also deal with it as a "privilege." Therefore, it is clear that the right is regarded by the Court as being a "privilege." If the executor once asserts his right of retainer I have no doubt that he at that moment becomes, in respect of the proceeds arising from the assertion of the right, a trustee for the cestuis que trust; but, in my opinion, there is no trust whatever attached to the right of retainer itself so long as it is not asserted.

But it was suggested by Mr. Upjohn, in his very instructive argument, that the executor must really and of necessity be

C. A. 1905

BENETT, *In re.* WARD v. BENETT.

Vaughan Williams L.J.

a trustee in a sense from the very first, and that he is bound to collect and preserve the property of which his testator was trustee. I agree, but in my view the reason why he has to collect and preserve the property is because that obligation has been thrown upon him by his testator virtute officii. I do not think, however, that it is proper to describe him as a trustee in this matter of collection and preservation, or to say that, because in the course of that collection and preservation he is entitled to exercise this personal privilege of retainer, therefore the same obligation which imposes upon him the duty of collecting and preserving all the personal estate of his testator necessarily makes him a trustee for the beneficiaries in any sense entitling them to insist on the exercise of this right of retainer in their favour. The case is not entirely unlike the case of an assignee in bankruptcy. The assignee or trustee in bankruptcy takes over the estate of the bankrupt. With regard to many kinds of property vested in the bankrupt, they may be of such a nature that no interest whatever in them can ever come to the creditors, as no part of the property in question is beneficially the property of the bankrupt; but very often it happens that there is property with regard to which it is not certain whether the bankrupt had any interest or not. It has been held in such cases that the mere possibility of an interest in the bankrupt is not enough to pass to the assignee. In some cases the circumstances may be explained so as to shew that the interest was a beneficial interest vested in the debtor, and one which on his bankruptcy passed to the representative of his estate. I do not say that in those cases the assignee in bankruptcy would necessarily be a trustee for the cestuis que trust to whom the debtor was indebted, although he might have had duties to perform in the preservation of the property. Then suppose the assignee in bankruptcy dies, he being in the position of sole trustee, and the estate is still outstanding, I do not think that the executor of the assignee or of that sole trustee can be held to be responsible for, or to have any duty of, getting in the bankrupt's estate.

Under these circumstances, in my judgment, the right conclusion is that at which Joyce J. arrived in *In re Ridley*. (1) He

(1) [1904] 2 Ch. 774.

does not in terms deal very much either with *Fox* v. *Garrett* (1), or with *Sander* v. *Heathfield* (2), or with *Re Faithfull* (3)—I do not know whether this last case was cited to him—or with *In re Owen* (4); but it appears to me that he came to the conclusion—and rightly so—that where the executor of a sole trustee has not accepted the position of trustee, or has not in any way accepted the office of trustee, he cannot be ordered by the Court at the instance of the cestuis que trust of his deceased testator to exercise the right of retainer. I should like to add that I am not at all sure that, after the appointment of new trustees in this case, the liberty to exercise the right of retainer continued to be exercisable. In my opinion, therefore, this appeal must be allowed.

STIRLING L.J. The facts which give rise to the question we have to decide may be stated very shortly. They are that the surviving trustee of the will of Elizabeth Horne died insolvent, intestate, and having committed a breach of trust in respect of which his estate was indebted to the Horne estate. His widow took out administration to his estate and became his legal personal representative. The will of Elizabeth Horne was so expressed that the widow, as such legal personal representative, might have become trustee of the will and have acted in the execution of the trusts had she elected so to do. She, however, did not desire to become trustee of the will, and she studiously abstained from doing anything which amounted to an acceptance of the trusts of the will. Upon this point we differ from Buckley J., who came to the contrary conclusion upon the evidence, which was not so fully before him as it has been before us. The legal personal representative of the deceased trustee did, however, appoint new trustees of the will, and it is to be remarked that the deed appointing these new trustees contained no vesting declaration so as to pass to them the right to sue in respect of any legal choses in action which were vested in the deceased trustee. The new trustees now ask for a declaration that the legal personal representative of the deceased

(1) 28 Beav. 16.
(2) L. R. 19 Eq. 21.
(3) 57 L. T. 14.
(4) 23 L. R. Ir. 328, 332.

C. A. 1905 — BENETT, *In re.* WARD v. BENETT. — Stirling L.J.

trustee may be ordered to exercise the right of retainer vested in her in favour of the persons beneficially entitled under Elizabeth Horne's will; and the question we have to decide is whether that legal personal representative is under any obligation to exercise that right of retainer on behalf of those beneficiaries. We have had the benefit of a very able argument from Mr. Upjohn, and he puts his case in this way. He begins by assuming that there was a sole trustee in whom was vested a legal chose in action. On his death, Mr. Upjohn says, a new trustee, properly appointed, being unable, as he would have been before the Judicature Act, to get a legal assignment to himself of that legal chose in action, might have required the personal representative of the deceased trustee to permit him to sue in the name of that representative for the purpose of getting in that chose in action for the estate, and I agree in thinking that the new trustee might have so done. Then Mr. Upjohn goes on to say that, even supposing the debtor was himself the deceased trustee, then (as is perfectly obvious) the representative of that deceased trustee cannot sue himself, but he is given by law the privilege of retaining out of the assets of the deceased person whom he represents an amount sufficient to answer the debt due to himself, and (he says) the new trustee can call upon the legal personal representative to exercise the right of retainer for the benefit of the cestuis que trust just as he could have called upon that legal personal representative to let him use his name for the purpose of recovering the legal chose in action. That reasoning, supposing it to be sound, is all based upon the impossibility of the trustee suing at law in his own name in order to recover the legal chose in action; but it breaks down here for the reason that the right in the present case is purely an equitable one. It arises from the deceased trustee having dealt with his trust estate in such a manner as to make him liable for a breach of trust. The right to sue in respect of that breach of trust is an equitable right. To enforce that liability the beneficiaries could in equity sue the legal personal representative of the deceased trustee. New trustees, when properly appointed, could also in equity sue the legal personal representative, without obtaining an assignment from any one or a vesting

order from the Court. I think, therefore, that this, which was the main argument on behalf of the respondents, fails at this point. And I should point out that, if it were well founded, the result would be that, in every case in which a sole surviving trustee had died insolvent and having committed a breach of trust, it would be the duty of the legal personal representative of that deceased trustee so dying to exercise in favour of the beneficiaries every right which that sole trustee had for the purpose of recouping the trust estate; and a further result would be, as was admitted, that the legal personal representative, having a right of retainer and failing to exercise that right which had become vested in him, would be guilty of a breach of duty through not having exercised that right of retainer. For that proposition so stated no authority has been produced to us; and it seems to me that, considering that unfortunately breaches of trust committed by a sole trustee who has died insolvent have not been unknown for a long period, one would expect that some authority, if it existed, would have been produced. I do not deny that there may be cases in which the legal personal representative of the deceased trustee might be called upon by the cestuis que trust to exercise a legal right of retainer vested in him. It would be easy to cite examples of this. For instance, one might take the case of the surviving trustee of a marriage settlement containing a covenant on the part of one of two trustees to pay a sum of money which would, when paid, form part of the trust estate: supposing that the trustee who entered into that covenant died insolvent and intestate, and the surviving co-trustee as a legal creditor in respect of the debt on the covenant took out administration to his estate, then in my opinion, having obtained that administration by virtue of his position as surviving trusteee of the settlement, he would be bound to exercise such powers as the law gave him for the benefit of the cestuis que trust; and one can conceive of other cases in which the legal personal representative of a surviving trustee of a settlement would stand in the position of trustee for the beneficiaries under that settlement and the same reasoning would apply. But I do not see how, on principle, a legal personal representative who is not under any such

C. A. 1905 BENETT, *In re.* WARD v. BENETT. Stirling L J.

obligation as I have pointed out towards the beneficiaries under some other instrument can be called upon to exercise for their benefit the right of retainer which the law has given him for the purpose of satisfying his own personal debt. With regard to authority, the decision of Joyce J. in *In re Ridley* (1) is an express decision in favour of the view which I have taken. The principal authority which was cited on the other hand is *Fox* v. *Garrett* (2), before Lord Romilly, M.R.; and that decision has been followed under precisely similar circumstances in Ireland in the case of *In re Owen.* (3) In both those cases, as I read them, there was a legal debt, and on that ground the present case is distinguishable. Another reason for distinguishing the present case is that in both those cases the two estates were being administered by the Court; and it may be (though this is not stated in the report of either case) that there was some ground upon which a duty towards one particular estate might have been discovered, so that on that ground also this case does not appear to be covered by those decisions. However, even if the distinction is not satisfactory, I prefer the view taken by Joyce J. to that taken by Lord Romilly.

Then, with regard to *Sander* v. *Heathfield* (4), which was followed by Chitty J. in *Re Faithfull* (5), I do not think our decision trenches upon those decisions in any way. In both those cases the legal personal representative had elected to exercise the right of retainer, and all that was held was that, she having so elected to exercise it, she had done nothing with which a Court of Equity could interfere, and that, having so elected, she was entitled to appropriate the fund for the benefit of the persons beneficially entitled under the trust. As regards the decision of Buckley J. in the present case, it was arrived at on a ground which in fact we have held is not well founded, namely, that the legal personal representative had elected to accept the trusts of Elizabeth Horne's will; and that being negatived, the whole ground upon which Buckley J. rested his decision is removed. Therefore, I think this appeal ought to be allowed.

(1) [1904] 2 Ch. 774.
(2) 28 Beav. 16.
(3) 23 L. R. Ir. 328.
(4) L. R. 19 Eq. 21.
(5) 57 L. T. 14.

COZENS-HARDY L.J. I am of the same opinion, and for the same reasons; and I have very little to add. Buckley J. held that the legal personal representative of the surviving trustee of the will had accepted the trusts, because her solicitor had paid 17*l.*, the premium on the Royal Exchange Assurance policy which was given as a security for the past debt. This I must regard as a payment by her, it having been made by her solicitor, but it was a payment by her for the benefit of whomsoever it might concern, for it was not known at the time whether the policy formed part of the intestate's estate or of the estate of which the intestate had been trustee; and I should be sorry to think we are obliged to hold that by such a dubious act this lady had accepted the office of trustee of Elizabeth Horne's will.

That being so, we have to consider what is the position of the legal personal representative of a sole trustee with reference to the right of retainer. Now, as my Lord has pointed out, the right is a personal privilege, though of course there may be a duty superadded. If the legal personal representative fills the position of trustee, then the view taken by Romer J. in *Davies* v. *Parry* (1) is correct; for if the legal personal representative is trustee he is compellable to exercise the right, because his position as trustee for the cestuis que trust is superadded to his position as legal personal representative of the deceased trustee.

But apart from authority, I see no reason why, if that relation does not exist, the legal personal representative should be bound to satisfy these particular creditors rather than any others. This right of retainer is, as has been said, a personal privilege, and there is no good reason for compelling an unwilling representative to exercise this right. No doubt, our decision seems to be contrary to that in *Fox* v. *Garrett* (2); but, if so, I agree with my Lord and with Stirling L.J. that that case was wrongly decided, and that the decision of Joyce J. in *In re Ridley* (3) was right and is to be preferred.

Solicitors: *Law & Worssam; Downing, Handcock, Middleton & Lewis, for Bond & Pearce, Plymouth; Pearce & Sons.*

(1) [1899] 1 Ch. 602, 607. (2) 28 Beav. 16.
(3) [1904] 2 Ch. 774.

G. I. F. C.

C. A.
1905
Nov. 28, 30;
Dec. 14.

RUSHMER *v.* POLSUE & ALFIERI, LIMITED.

[1904 R. 1849.]

Nuisance—Trade District—Noisy Neighbourhood—Printing Machinery—Noise, Increase of—Residence—Standard of Comfort—Injunction.

In a locality devoted to noisy trades, such as the printing and allied trades, if a printing-house or factory subjects the occupier of an adjoining residence to such an increase of noise as to interfere substantially with the ordinary comfort of human existence according to the standard of comfort prevailing in the locality, that is sufficient to constitute an actionable wrong entitling that occupier to an injunction.

The principles upon which a legal nuisance arising from an increase of noise in an already noisy neighbourhood may be restrained by injunction considered.

St. Helen's Smelting Co. v. *Tipping*, (1865) 11 H. L. C. 642; *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409; and *Sturges* v. *Bridgman*, (1879) 11 Ch. D. 852, considered and applied.

Decision of Warrington J. affirmed.

Appeal from the judgment of Warrington J. granting a perpetual injunction to restrain a nuisance arising from noise.

The facts of the case, as shewn by the evidence, were as follows:—

For the last seventeen or eighteen years the plaintiff had been, and he still was, the occupier, and was also the present lessee, of a house, No. 8, Gough Square, Fleet Street, in the City of London, in which he was residing with his family. In a shop on the ground floor he carried on the business of a dairyman.

Gough Square was a small oblong space situate in a district bounded on the east by Shoe Lane, on the south by Fleet Street, on the west by Fetter Lane, and on the north by Holborn. It was a district specially devoted to the printing and allied trades. There was no thoroughfare for wheeled traffic in Gough Square, the only access for such traffic being under an archway in the north-west corner. The plaintiff's house, No. 8, was in the north-east corner. For a house in the heart of the City of London the plaintiff's was, it appeared, in a quiet situation, except for such noises as inevitably arose from neighbouring business

establishments. No. 7, Gough Square, the house adjoining the plaintiff's house on the west side, had for some time been occupied by persons maintaining and working machinery, but it appeared from the evidence that although in the day time the plaintiff must have been subjected to noise from that source, yet no noisy machinery had been worked at night in that house. Nearly opposite to the plaintiff's house was a large printing establishment, Messrs. Pardon's, in which work on certain days of the week proceeded at night, and some distance further away were the printing works of the *Daily Telegraph* newspaper, which were run regularly at night. The evidence, however, shewed that no disturbance at night was caused by noise arising from either of those sources.

The defendants, Polsue & Alfieri, Limited, were a company carrying on business as printers and publishers at Nos. 4 and 5, Gough Square, and at No. 10, Wine Office Court, which latter house immediately adjoined the plaintiff's house, being separated therefrom only by a party-wall. No. 10, Wine Office Court, was taken by the defendants in 1904. A printing business had been previously carried on there, though without causing the plaintiff any nuisance from noise; but in September of that year the defendants set up in that house and began to work certain machinery, including a cutter on the ground floor and a printing machine in the basement. The noise of which the plaintiff complained mainly arose from this printing machine, the evidence shewing that no real nuisance arose from the cutter. The printing machine was of an improved type, quieter, it was said, than most machines of the kind, and was properly fixed upon a concrete bed. It was driven by an electric motor, and was usually run at a speed throwing off 1440 impressions per hour; but under exceptional circumstances it might be, and in fact had been, run at a rate of 1560 impressions. It had always been carefully and properly worked. When first set up it was driven through the medium of a shafting fixed to the ceiling of the room; but after a complaint by the plaintiff this was altered and the machine was driven by a belt passing directly to it from the motor. In October, 1904, the plaintiff again complained, and on October 21 caused a formal letter of complaint to be

C. A. 1905 — RUSHMER v. POLSUE & ALFIERI, LIMITED.

written by his solicitor. To this no reply was made, and on November 1 the plaintiff issued the writ in this action against the defendants for an injunction to restrain them from so working their machinery and carrying on their printing works at No. 10, Wine Office Court, as, by reason of noise or otherwise, to cause a nuisance or annoyance to the plaintiff as lessee and occupier of the house No. 8, Gough Square, or to his family, or to the persons inhabiting or resorting to that house. Notice of motion for an injunction was given, but the motion was never heard, the action being by arrangement at once set down for speedy trial.

In their defence to the plaintiff's statement of claim, the defendants denied that their printing machine was being so worked as to cause a nuisance to the plaintiff, and they insisted that, as his premises were situated in the heart of a district almost entirely devoted to the printing and allied trades, he was not entitled to an injunction. At the trial oral evidence was given on both sides by several engineering experts as to the general nature and effect of the noises arising from printing and other machines in the neighbourhood. As to the noise caused by the defendants' machine and the alleged nuisance arising therefrom to the plaintiff and his family, particularly at night, evidence was given by several persons, including, in addition to the plaintiff, his two daughters and his son. At the conclusion of the trial, before Warrington J., which occupied five days of the Michaelmas Sittings, 1904, his Lordship reserved judgment. On January 12, 1905, he delivered his judgment, in which he commenced with the following statement of the legal principles which, in his opinion, were applicable to the case:—"The question I have to answer is whether the defendants, by working the machine in question, seriously interfere with the comfort, physically, of the plaintiff and his family in the occupation of his house according to the ordinary notions prevalent among reasonable English men and women: *Walter* v. *Selfe* (1); and for the purpose of answering this question I am not to look at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in

(1) (1851) 4 De G. & Sm. 315, 322.

particular in reference to the nature of the trades usually carried on there, and the noises and disturbance existing prior to the commencement of the defendants' operations: *Sturges* v. *Bridgman* (1); *St. Helen's Smelting Co.* v. *Tipping*. (2) But if, after taking these circumstances into consideration, I find a serious and not merely a slight additional interference with the plaintiff's comfort as above defined, I think it is the duty of the Court to interfere: *Crump* v. *Lambert*. (3) This seems to me to be the true result of the authorities." His Lordship then proceeded to deal with the evidence, and stated the three following definite findings of fact:—First, that although in the day time the plaintiff must have been subject to some noise from printing works in the immediate neighbourhood, no disturbance at night had been caused by noise arising from any of those sources. Secondly, that as regarded the ordinary working hours in the daytime, the plaintiff had not proved such a substantial addition to pre-existing noises as would amount to a legal nuisance. And, thirdly, that the night working of the defendants' machine caused a serious disturbance to the plaintiff and his family such as had not previously been experienced by them; and his Lordship held that to be a legal nuisance entitling the plaintiff to an injunction. Accordingly he granted a perpetual injunction restraining the defendants, their workmen, servants and agents from so working their machinery and so carrying on their printing works at No. 10, Wine Office Court, as by reason of noise to cause a nuisance to the plaintiff as lessee and occupier of the adjoining house, No. 8, Gough Square, or to his family, or to the persons inhabiting or resorting to such house.

The defendants appealed.

The appeal was heard on November 28 and 30, 1905.

Duke, K.C., *F. Hinde*, and *Couch*, for the defendants. It is submitted that the learned judge has not come to a right conclusion upon the evidence. The defendants' house had been used previously as a printing establishment. The plaintiff's claim is too wide, for he says he is entitled to enjoy his house—which is the only house used as a domestic residence in the

(1) 11 Ch. D. 852, 865. (2) 11 H. L. C. 642.
(3) L. R. 3 Eq. 409.

C. A. 1905

RUSHMER v. POLSUE & ALFIERI, LIMITED.

neighbourhood—free from the noise incidental to that neighbourhood. Before either the plaintiff or the defendants came there the locality had acquired the character of one mainly occupied by printing offices. The plaintiff came to the nuisance, and cannot be heard to complain of it. The increase of noise due to the defendants' machine is trivial. It is plain that the plaintiff's daughters ignored the noise produced by other printing works, which had been going on for years, so that they had become accustomed to it, and thought only of the noise caused by the defendants' works, which was a novelty.

It is contended that the defendants are only making a reasonable and accustomed use of their premises having regard to the character of the neighbourhood: *St. Helen's Smelting Co.* v. *Tipping* (1); *Gaunt* v. *Fynney* (2); *Sturges* v. *Bridgman* (3); *Christie* v. *Davey* (4); *Sanders-Clark* v. *Grosvenor Mansions Co.* (5); *Attorney-General* v. *Cole & Son* (6); *Bamford* v. *Turnley*. (7)

[STIRLING L.J. referred to *Walter* v. *Selfe*. (8)

VAUGHAN WILLIAMS L.J. referred to *Ball* v. *Ray*. (9)]

Warrington J. has accepted those cases as affording the proper test; but it is submitted that he has not applied the test properly, having regard to the facts which he has found upon the evidence.

It is submitted that the evidence does not prove such substantial discomfort caused to the plaintiff in a district of this character as justifies the granting of an injunction.

In cases of this kind, whether the nuisance complained of arises from noise or from obstruction to light, the Court will always consider the nature of the locality: *Sturges* v. *Bridgman* (3); *Clarke* v. *Clark* (10); *Attorney-General* v. *Sheffield Gas Consumers Co.* (11); *Fanshawe* v. *London and Provincial Dairy Co.* (12) The plaintiff must prove substantial damage: *Salvin* v. *North Brancepeth Coal Co.* (13) It is true that the learned judge has found

(1) 11 H. L. C. 642.
(2) (1872) L. R. 8 Ch. 8, 10, 13.
(3) 11 Ch. D. 852, 865.
(4) [1893] 1 Ch. 316.
(5) [1900] 2 Ch. 373.
(6) [1901] 1 Ch. 205.
(7) (1860) 3 B. & S. 62.
(8) 4 De G. & Sm. 315.
(9) (1873) L. R. 8 Ch. 467.
(10) (1865) L. R. 1 Ch. 16.
(11) (1853) 3 D. M. & G. 304, 339.
(12) (1888) 4 Times L. R. 694.
(13) (1874) L. R. 9 Ch. 705.

certain facts to have been proved on the oral evidence, and that he has had the advantage of seeing the witnesses and their demeanour; but it does not necessarily follow that his findings should be accepted by this Court. The learned judge himself evidently found considerable difficulty in arriving at a conclusion on the evidence, for the delivery of his judgment stood over for a considerable time, and it is submitted that, although this Court will give due weight to his opinion, yet it should now examine the evidence and act upon its own view of that evidence, it being undoubtedly conflicting: *Smith* v. *Chadwick* (1); *Montgomerie & Co* v. *Wallace-James* (2); *Coghlan* v. *Cumberland* (3); and the balance of evidence does not support the plaintiff's case.

H. Terrell, K.C., and *Coote*, for the plaintiff. Although this district is one devoted to noisy trades, yet there is no prescriptive right, in the strict legal sense, on the part of any person using noisy machinery there to make as much noise as he pleases, merely because he is carrying on business in a noisy district. The utmost that can be said is that there is acquiescence by the owners of land in the district to the user of the land of any particular owner for a particular purpose. But any owner, though submitting to that burden, can object to that burden being increased to his prejudice. There is no authority for the proposition that an owner of land in a noisy trade district is bound to submit to any increase of the noise; otherwise a man might increase his existing noise a thousand-fold, and so render life unendurable.

Sturges v. *Bridgman* (4) does not support that proposition. What Thesiger L.J. there means is that if a man chooses to live in a district devoted to a particular trade, he cannot complain if that trade is carried on in the particular and established manner. The real question here is, has the burden already imposed on the plaintiff been substantially increased? An existing nuisance, when added to only in an infinitesimal degree, is not an actionable nuisance; but it is otherwise if the addition is so substantial as to interfere with the ordinary comfort of life: *Crump* v. *Lambert* (5), which case, if it is good law, governs the present.

(1) (1884) 9 App. Cas. 187, 194.
(2) [1904] A. C. 73, 75.
(3) [1898] 1 Ch. 704.
(4) 11 Ch. D. 865.
(5) L. R. 3 Eq. 409.

C. A. 1905

RUSHMER v. POLSUE & ALFIERI, LIMITED.

[STIRLING L.J. Has it ever been considered in any subsequent case?]

It has been constantly referred to and never questioned.

It is treated as good law in *J. Lyons & Sons* v. *Wilkins*. (1) Similar cases to the present are *Heather* v. *Pardon* (2), where an injunction was granted to restrain a nuisance from increased noise and vibration from adjoining steam printing works; and *Bartlett* v. *Marshall* (3), where the nuisance arose from the continuous passage at night of the carts of newspaper forwarding agents. In *Crossley & Sons* v. *Lightowler* (4) it was held that the user which originated a right must also be measure of that right, and that it cannot be enlarged to the prejudice of any other person. In short, the owners in a particular district are only bound to submit to such nuisance as may be already existing.

Duke, K.C., in reply. In *Crump* v. *Lambert* (5) the plaintiff's house was not, as it is here, in a district devoted to factories or noisy trades, for, as was there stated, the working of the defendants' factory had "produced a completely new state of things" as regarded the plaintiff's house. In *Heather* v. *Pardon* (2) the present question did not arise, for there the district was not one devoted to printing or any other noisy trade, but only to bookselling, one of the quietest of trades. In *Bartlett* v. *Marshall* (3) the plaintiff's premises were not in a printing district, but in a street mainly occupied for residential or professional purposes. *Crossley & Sons* v. *Lightowler* (4) has no application. That was the case of a claim to a prescriptive right to foul a stream, that is, to create a public nuisance. The plaintiff here does not found his case on prescription at all.

[STIRLING L.J. But what do you say to Lord Chelmsford's observations in that case as to the measure of the defendant's right of fouling the stream?]

I submit that every element in the present case is to be found in Lord Westbury's speech in *St. Helen's Smelting Co.* v. *Tipping*. (6)

Cur. adv. vult.

(1) [1899] 1 Ch. 255, 267.
(2) (1877) 37 L. T. 393.
(3) (1895) 44 W. R. 251.
(4) (1867) L. R. 2 Ch. 478, 481.
(5) L. R. 3 Eq. 409, 414.
(6) 11 H. L. C. 650.

Dec. 14. VAUGHAN WILLIAMS L.J., after shortly stating the object of the action and the nature of the evidence, and reading the principles stated by Warrington J., in the portion of his judgment above quoted, as being applicable to the case, proceeded:—It seems to me that these principles as expressed by Warrington J. contain nothing which is not supported by the authorities cited by him. And I find nothing in these authorities which makes them inconsistent with one another, although Mr. Terrell, arguing on behalf of the plaintiff respondent, urged—and urged very strongly in argument, telling the Court that he had urged the same argument before Warrington J.—that the case of *Crump* v. *Lambert* (1) would entitle the plaintiff to an injunction if the result of the defendants' printing operations at night, in a house adjoining the plaintiffs' residence, was to cause serious inconvenience to the plaintiff and his family, even though the locality was devoted to the printing trade carried on by printers in a particular and established manner not constituting a public nuisance: and he argued that the printing so carried on in such a district, in such a locality, was an actionable wrong if it caused serious disturbance to the plaintiff and his family by reason of the printing machine being used on premises immediately adjoining the plaintiff's residence; and that prescriptive right alone could prevent such conduct of the defendants' business constituting an actionable wrong. I do not think the case of *Crump* v. *Lambert* (1) justifies either part of this argument; and I further think that, if it did, it would be inconsistent with the law as stated by Lord Westbury and Lord Cranworth in *St. Helen's Smelting Co.* v. *Tipping* (2) and with the judgment of Thesiger L.J. in *Sturges* v. *Bridgman*. (3)

Now, this appeal is based partly upon the judgment being against the weight of evidence, and partly on the ground that Warrington J., having regard to the evidence, could not have properly applied the principles laid down in those cases. The learned judge, however, in the statement of facts in his judgment, spoke of Gough Square as a small oblong space situate in the

(1) L. R. 3 Eq. 409. (2) 11 H. L. C. 642.
(3) 11 Ch. D. 852.

C. A. 1905 RUSHMER v. POLSUE & ALFIERI, LIMITED. Vaughan Williams L.J.

City of London, in the district bounded on the east by Shoe Lane, and on the south by Fleet Street, on the west by Fetter Lane, and on the north by Holborn, and that it was a district specially devoted to the printing and allied trades, and that there was no thoroughfare for wheeled traffic in Gough Square. The learned judge concluded this statement of facts by saying: "For a house in the heart of the City of London the plaintiff's is in a quiet situation but for such noises as arise from neighbouring business establishments. Prior to the starting, in September, 1904, of the defendants' machinery there was no noise proceeding from the house No. 10, Wine Office Court. The house on the other (the west) side of the plaintiff's—viz., No. 7, Gough Square—had for some time been occupied by persons maintaining and working machinery; and I come to the conclusion on the evidence that in the day time the plaintiff must have been subjected to a noise from that source, but no noisy machinery has been worked at night in this house. Nearly opposite to the plaintiff's house was a large printing establishment, Messrs. Pardon's, in which work on certain days of the week proceeded at night, and some distance further away were the printing works of the *Daily Telegraph*, which were run regularly at night. I find on the evidence, and particularly that of the plaintiff's two daughters, that no disturbance at night was caused by noise arising from these sources."

It was urged upon us by counsel for the defendants, that, if one takes these findings of the judge in conjunction with the finding at the end of his judgment—namely that, as a fact, the night work caused serious disturbance to the plaintiff and his family, and that such disturbance had not been previously experienced by them—it becomes apparent that, although the learned judge referred to the principles laid down in *Walter* v. *Selfe* (1), *Sturges* v. *Bridgman* (2), *St. Helen's Smelting Co.* v. *Tipping* (3), and *Crump* v. *Lambert* (4), as the principles governing the present case, and that although the passages referred to, taken by themselves, may not be inconsistent with the judgment in this case, yet, if those cases are examined, it would

(1) 4 De G. & Sm. 315, 322.
(2) 11 Ch. D. 852, 865.
(3) 11 H. L. C. 642.
(4) L. R. 3 Eq. 409.

seem that the learned judge has not applied the principles established by them, and that this especially appears to be so if the findings at the end of the judgment in this case are read in connection with the evidence, and that if they are not so read those findings are contrary to the evidence. There are, in my opinion, considerable grounds for this conclusion. The findings of the learned judge are quite consistent with the view that the cases above referred to establish the principle that in an action for nuisance not alleged to be a public nuisance the standard of comfort to be applied—when the tribunal dealing with the facts asks itself the question whether the acts done by the defendants constitute a material interference with the ordinary comfort, physically, of human existence—is the same in a district devoted to a trade carried on by traders in a particular and established manner as it would be outside such a district so devoted to a particular trade. To put it in another way, the findings of the learned judge, and his judgment, are consistent with his having taken the view that if a man lives in a district or street where there are numerous printing establishments, and a printing office is opened next door to him which, in a district devoted to the printing trade, is carried on in the particular and established manner of the printing trade of that district, he has ground for complaint and a cause of action for nuisance, because to him individually there may arise serious discomfort from the printing operations carried on next door in a house not previously used as a printing office, or in a house not previously used for night printing. This was the argument, in fact, presented to us by Mr. Terrell as counsel for the plaintiff, who contended that on this view the findings of the learned judge were amply established by the evidence, which clearly shewed, in the language of Lord Romilly in *Crump* v. *Lambert* (1), which he cited, that there was a material interference with the ordinary comfort of human existence. I may observe that I do not myself think that Lord Romilly meant by his decision to exclude the proposition of law that in a district or street devoted to trade a different standard of comfort should be applied when answering the question whether there has been

(1) L. R. 3 Eq. 409.

C. A. 1905 — RUSHMER v. POLSUE & ALFIERI, LIMITED. — Vaughan Williams L.J.

a material interference with ordinary comfort in such a district from that which would otherwise be applied; for he says (1): "The smoke of the defendants' factory has produced a completely new state of things as regards the plaintiff's house and grounds." I cannot, however, but see that these words are not inconsistent with the contention that, even in a district or street devoted to trade, if a new factory or printing-house is opened, subjecting the occupier of some house in that district or street to an amount of noise interfering materially with human comfort, this is sufficient to constitute an actionable wrong, and that the words are consistent with the law, namely, that the defendant in such a case could not ask to have Lord Romilly's words, "ordinary comfort of human existence," qualified by the addition, "as enjoyed in this district devoted to a particular trade." But if Lord Romilly did mean this, it seems to me that his words are plainly inconsistent with these words of Lord Westbury in the *St. Helen's Case* (2): "If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property." And, further, it seems to me that Lord Romilly's words, if they are to have the above meaning, are also inconsistent with the words of Lord Cranworth in the same case (3), where, speaking of a case tried by him in the county of Durham as a Baron of the Exchequer, he says: "It was proved incontestably that smoke did come and in some

(1) L. R. 3 Eq. 414. (2) 11 H. L. C. 642, 650.
(3) 11 H. L. C. 653.

degree interfere with a certain person; but I said, 'You mus look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person residing in the town of Shields.'"

The view that the standard of what amount of freedom from smoke, smell, and noise a man may reasonably expect will vary with the locality in which he dwells seems to me confirmed by the following passage in Lord Halsbury's judgment in *Colls* v. *Home and Colonial Stores* (1): "A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." The view I have just stated is confirmed also by the judgment of Lord Hardwicke in *Fishmongers' Co.* v. *East India Co.* (2), cited by Lord Macnaghten and also by Lord Davey. It should also be observed that the present action is an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort, and not upon the ground that the alleged nuisance produces material injury to the plaintiff's property. And Lord Westbury, in *St. Helen's Smelting Co.* v. *Tipping* (3), draws a distinction between these cases, saying of the case where the thing alleged to be a nuisance is productive merely of personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, that anything that discomposes or injuriously affects the senses or nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly upon the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, and which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the

(1) [1904] A. C. 179, 185. (2) (1752) 1 Dick. 163.
(3) 11 H. L. C. 650.

C. A. 1905 RUSHMER v. POLSUE & ALFIERI, LIMITED. Vaughan Williams L.J.

benefit of the inhabitants of the town and of the public at large. These observations seem peculiarly applicable to the case of a plaintiff who, as in the present case, carries on, in fact, the business of supplying milk to the persons employed in the very trade to which the district is devoted, and who gets compensation for the personal annoyance to which he is subjected when residing, for the convenience of his milk trade, in a district in which there are very few other residents.

My brethren are, I believe, of opinion that the evidence in this case, and in particular the evidence of the expert called by the plaintiff and the evidence with reference to the noise made at night by the printing machines of the *Daily Telegraph* and of Messrs. Pardon, is not of such a character as to justify the conclusion that the learned judge, in his ultimate finding, in fact failed properly to apply the law as laid down in the House of Lords in *St. Helen's Smelting Co.* v. *Tipping* (1), and in the Court of Appeal in *Sturges* v. *Bridgman* (2), and acted on a view of Lord Romilly's decision in *Crump* v. *Lambert* (3) inconsistent with those decisions. I do not think I ought to differ from this conclusion or inference of fact; and, accepting this conclusion, it would not be right to review the decision in fact of the judge who tried the case and saw and heard the witnesses. I think, however, that I ought to point out that, in my opinion, it would be inconsistent with the view expressed by Lord Westbury in *St. Helen's Smelting Co.* v. *Tipping* (4) in the passage I have already read, and also inconsistent with the view expressed by Thesiger L.J. in *Sturges* v. *Bridgman* (2), to hold that the fact that night work caused a serious disturbance to the plaintiff and his family, in a locality devoted to a particular trade carried on by the traders in a particular and established manner, constituted private and actionable wrong. In *Sturges* v. *Bridgman* (5) Thesiger L.J. expresses his view thus: "Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square

(1) 11 H. L. C. 642.
(2) 11 Ch. D. 852.
(3) L. R. 3 Eq. 409.
(4) 11 H. L. C. 650.
(5) 11 Ch. D. 865.

would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong." Again, I do not think the fact that the noise of the defendants' printing machine was a substantial addition to pre-existing noises would amount to a legal nuisance, if such noise was only the result of carrying on the trade in the district devoted to that trade according to the particular and established manner. So to hold would, in my judgment, be to disregard the standard of comfort which a person living in such a district would have a right to expect, and, in effect, to hold, as Mr. Terrell argued, that the plaintiff in such circumstances would have suffered a private actionable wrong, unless the defendant could establish a prescriptive right, which I much doubt whether he could ever do in respect of a nuisance which he could not prevent, and therefore could not acquiesce in. I do not think, to use the words of Lord Westbury, that the plaintiff would have, in such a district, a good cause of action merely "because to himself individually there may arise much discomfort from the trade carried on in" the newly-opened printing office. It may be, however, that Warrington J. did not intend by his judgment anything to the contrary of this, and that he really intended to find that the defendants' trade was not being carried on in the particular and established manner of the printing district, but caused serious disturbance to the plaintiff and his family by making noises in excess of those made by carrying on the trade in the particular and established manner of the trade of the district. I should not myself have arrived at this conclusion on the evidence as it appears from reading the notes, but I agree that this is not a sufficient ground for reviewing the decision of the learned judge if he, in fact, applied the principles established by *St. Helen's Smelting Co.* v. *Tipping* (1) and *Sturges* v. *Bridgman*. (2) In my opinion this appeal should be dismissed.

(1) 11 H. L. C. 642. (2) 11 Ch D. 852.

C. A. 1905

RUSHMER v. POLSUE & ALFIERI, LIMITED.

STIRLING L.J. The plaintiff in this action complains of a nuisance by noise, causing serious interference with the physical comfort of himself and his family. The plaintiff has been for the last seventeen or eighteen years, and still is, the occupier of a house, No. 8, Gough Square, situate in the City of London, in the heart of a district the buildings in which are, to a large extent, used for carrying on printing businesses. He himself carries on the business of a dairyman on the ground floor of his house; the rest is occupied as a residence by himself and his family. Down to a time shortly before the commencement of this action no noisy business had been carried on at night in either of the houses which adjoin the plaintiff's, but recently the defendants have established printing works in No. 10, Wine Office Court, which is one of those adjoining houses, and Warrington J. has held that these works are so carried on during the night (not by day) as to amount to a legal nuisance entitling the plaintiff to an injunction, which the learned judge has granted. From this decision the present appeal has been brought.

The learned judge, at the commencement of his judgment, has stated the legal principles on which he proposed to act, and the learned counsel who appeared for the appellants admitted, and in my opinion rightly admitted, that no fault could be found with the law as laid down by him. What they alleged was that the learned judge had failed to give due effect to the principles which he himself laid down. Warrington J. said (amongst other things not necessary to be stated) that, for the purposes of his decision, he was not to look at the defendants' operations in the abstract and by themselves, but in connection with all the circumstances of the locality, and in particular with regard to the trades usually carried on there and the noises and disturbance existing prior to the commencement of the defendants' operations; but that if, after taking these circumstances into consideration, he found a serious and not merely a slight interference with the plaintiff's comfort, he thought it his duty to interfere. It is contended that the learned judge, in coming to the conclusion that a serious and not merely a slight interference had been caused by the defendants' operations, applied a wrong standard, and treated as serious an amount of noise which

was not such according to the standard of a printing neighbourhood, though it might be serious according to the standard of a London West End square, or, still more so, of a quiet country neighbourhood. I am unable to see that this contention is well founded. What I understand the learned judge to have done is to consider, first, the noise and disturbance which existed before and apart from the defendants' operations; and, secondly, the noise and disturbance caused by the defendants' operations themselves; and to have come to the conclusion that those noises and disturbances taken together create an amount of discomfort by night in excess of that which an ordinary person could reasonably be expected to put up with in a printing neighbourhood. Although he does not, in his final conclusions, use precisely the same language in his finding with respect to the night work as he does in his finding with respect to the day work, I think he meant to find that in one case he did not, while in the other he did, find such a substantial addition to pre-existing noises as amounted to a legal nuisance. And though he does not say in so many words that on both findings he bore in mind the circumstances of the locality, I, nevertheless, think that that also was his meaning. Having considered the evidence, I find myself unable to differ from the decision of Warrington J., as I understand it, and, in my opinion, the appeal ought to be dismissed.

COZENS-HARDY L.J. This is an appeal from the judgment of Warrington J., who has granted an injunction restraining the defendants from so working a printing machine as to occasion a nuisance to the plaintiff. The plaintiff has for seventeen years been residing with his family at No. 8, Gough Square, Fleet Street. In the lower part of the house he carries on a milk business. The defendants' machine is next door to the plaintiff's house. The plaintiff's house is situate in a district specially devoted to the printing and allied trades, most of which are noisy, though not all equally noisy. The district is one in which it is not reasonable to expect the same quiet and freedom from noise as might be looked for in more purely residential neighbourhoods. Warrington J. has stated the legal principles which it was his duty to apply as follows. [His Lordship then

C. A. 1905 RUSHMER v. POLSUE & ALFIERI, LIMITED. Cozens-Hardy L.J.

read from the learned judge's judgment the passage above quoted and proceeded:—] In my opinion that is a statement of the law which is not only accurate, but adequate. He then proceeds to deal with the evidence. He does not leave us to infer the conclusions at which he has arrived, for he states certain definite findings of fact. [His Lordship then read the three findings above stated, and proceeded:—] In my opinion, it is not right for the Court of Appeal in a case like this to overrule the decision on issues of fact of a judge who has seen and heard the witnesses; and, this being so, I think the appeal must fail. I cannot doubt that the learned judge did apply the legal principles he himself enunciated, and I do not think we ought to embark upon the consideration of the question whether his mind may not have been influenced by some other legal view than that expressed by him. But some arguments were raised by counsel for the appellants and for the respondent to which I desire shortly to refer. It was strenuously contended by Mr. Duke that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it. This idea is expressed by Thesiger L.J. in *Sturges* v. *Bridgman* (1), when he said that what might be a nuisance in Belgrave Square would not be a nuisance in Bermondsey. But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern

(1) 11 Ch. D. 852.

and is reasonably worked. In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character.

It was, on the other hand, urged by Mr. Terrell that any kind of noise occasioning discomfort is actionable unless the defendant can prove a prescriptive right to create a noise. I do not think this argument can be supported, and I see no ground for supposing that Warrington J. was influenced by it. The lower standard of comfort existing, say, in Whitechapel would equally exist in one of the numerous districts which have sprung up in late years on the outskirts of the City, and which are occupied by persons of the same class as those who occupy the older houses in Whitechapel. In short, prescription has nothing to do with the case.

In the result I accept Warrington J.'s findings of fact, and his enunciation of the legal principles applicable to the case, and I I think that this appeal must be dismissed.

Solicitors: *M. W. Stikeman; H. E. Griffith.*

G. I. F. C.

C. A. 1906

Jan. 11, 13, 26, 29.

SIRDAR RUBBER COMPANY, LIMITED *v.* WALLINGTON, WESTON & CO.

[1903 S. 4655.]

Patent—Infringement—Combination—Specification—Insufficient Description—Repair—Old and New Component Parts.

Decision of Swinfen Eady J., [1905] 1 Ch. 451, affirmed on the ground of insufficiency of specification alone, the Court of Appeal expressing no opinion upon the question of law dealt with by him, namely, whether, assuming the plaintiffs' patent for a combination of rim and tyre to be good, the defendants had infringed it by fitting, by way of repair, a new tyre for which there was no patent into a rim for which there was a patent.

Appeal from Swinfen Eady J. (1)

The novel question of patent law dealt with in the report of the case below was again argued on behalf of the appellants, the plaintiffs, in addition to the question as to the true construction of the specification; but it is unnecessary to report the argument on the appeal, as the decision of the Court was confined solely to the question of construction.

A. J. Walter and *Colefax*, for the plaintiffs.

Bousfield, K.C., and *W. Neill*, for the defendants, commenced their argument by contending that the invention had been insufficiently described in the specification. They were then stopped by the Court.

The Court (Collins M.R., Romer and Cozens-Hardy L.JJ.), after reading and commenting on the specification, came to the same conclusion as Swinfen Eady J.—namely, that the plaintiffs' patent was bad for insufficient specification alone, and held that on that single ground the appeal must be dismissed with costs.

Cozens-Hardy L.J. added to his judgment on the point of construction the following observations :—I only wish to add these

(1) [1905] 1 Ch. 451.

few words. A question of general interest and extreme importance was raised in the trial before Swinfen Eady J. and was decided by him; I mean the question whether, assuming the patent for a combination of rim and solid rubber tyre to be good, the defendants had infringed that patent by simply putting a new tyre, for which there was no patent, into a rim for which there was a patent. Swinfen Eady J. decided that there was no infringement on that ground. That is a point which must in future stand solely on the authority of the learned judge. I only wish to say for myself, and I think I am speaking for my colleagues also, that we do not express any opinion either for or against that proposition.

C. A. 1906 SIRDAR RUBBER COMPANY, LIMITED v. WALLINGTON, WESTON & CO. Cozens-Hardy L.J.

Solicitors: *Shaen, Roscoe, Massey & Co.; Collyer-Bristow, Hill, Curtis, Booth & Co.*

G. I. F. C.

WHITEHOUSE *v.* HUGH.

KEKEWICH J. 1905 *Nov.* 20, 21, 22, 23, 24.

[1905 W. 174.]

Building Scheme—Plan—Implied Representation—Power to Vary—Blocking up Road—Cul-de-sac—Dedication to Public—Public User.

The plaintiff was the owner of a house built on a plot which formed part of an estate laid out by a building society in accordance with a scheme. On the sale of this plot by the society to the plaintiff's predecessor in title, it was shewn on a plan of the estate as bounded on one side by a vacant space, which, though not named in the plan as a road, had been in fact roughly made up by the society as a road. This road ran from the street on which the plaintiff's house fronted to a level crossing on a railway over which there was a private right of way for the benefit of the owners of a field on the opposite side of the line. The building society having acquired the field and released the right of way fenced off the road and sold the site to the defendant's predecessor in title. All the plots on the building estate were conveyed subject to a condition reserving to the building society the power of allowing variations in the plans and conditions. The plaintiff claimed to restrain the defendant from digging up the road on the ground, first, that it was a violation of the building scheme, and secondly, that the road had been dedicated to the public by user:—

Held, (1.) that the plan did not amount to a representation to intending purchasers that the vacant space shewn thereon should always remain

KEKEWICH J.

1905

WHITE-HOUSE v. HUGH.

vacant; (2.) that under the power of allowing variations it was competent to the society to allow the defendant to dig up the road; (3.) that assuming the plaintiff was entitled to try the question of dedication in the absence of the Attorney-General, the road being a cul-de-sac, mere user without more could not constitute a dedication to the public.

THIS was an action for an injunction to restrain the defendant from building upon a roadway adjoining the plaintiff's premises. The plaintiff was the owner of a cottage now known as No. 19, Mackenzie Road, Beckenham, with a garden in the rear, and he carried on the business of a market gardener on these premises. The plaintiff first occupied the premises as tenant in June, 1885, and on August 6, 1885, he purchased the freehold from C. G. Chamberlayne. The plaintiff's house was a corner house, and it was bounded on one side by a roadway, being the roadway in question in this action, from which it was separated by a close wooden fence. This roadway led from Mackenzie Road to a level crossing on a branch line of the London, Chatham and Dover Railway. The plaintiff's premises formed part of the Beckenham Park Estate, which was purchased by the Birkbeck Freehold Land Society, hereinafter called the building society, in 1869, and was ultimately laid out under a building scheme adopted by the society in 1875, which was a modification of an earlier building scheme. On July 18, 1878, Chamberlayne purchased from the building society plots 350, 351 and 352, and on plot 352 and part of plot 351 he built the house now owned by the plaintiff. The deed relating to plot 352, which was the common form of conveyance used by the building society since 1875, was on a printed form, which incorporated a reduced plan of the whole of the building estate. This plan shewed the position of the different plots, which were identified by numbers, and it also shewed the roads on the estate. On this plan there were delineated three roads running parallel to the railway, named respectively Mackenzie Road, Birkbeck Road, and Ravenscroft Road, and two roads running at right angles thereto, named respectively Pelham Road and Avenue Road. The plan also shewed a vacant space between plot 352 and plot 355, which extended from Mackenzie Road to the railway, but it was not named on the plan as a road. In the deed the land was shortly

described as having a frontage of twenty feet on Mackenzie Road, and it was further described by reference to the plan. This plot of land was shewn on the plan as extending to the railway, but some time before the plaintiff's purchase there was cut off from the end of the plaintiff's garden a six-foot passage which led from the roadway to a gate in the garden of the adjoining premises on plot 351. The conveyance was expressed to be made subject to the conditions and stipulations thereunder written. The only conditions bearing upon the present case were the following:—

"6. The vendors will make the roads, and each purchaser shall pay his proportion of the expenses of keeping them in repair until the public authorities undertake the same."

"9. The vendors reserve to themselves the power of allowing a variation of the plans and conditions."

The roadway above referred to had been roughly made up by the building society in 1873, but it had never been metalled. It was very little used, and at the time when the plaintiff bought his house it was overgrown at the sides with grass and weeds. It had not been repaired by anybody for a great many years. This roadway occupied the site of an approach road made by the railway company at the time of the making of the railway for the accommodation of the owners and occupiers of a meadow on the other side of the line. In 1893 the building society, having purchased this meadow, which lay between their Beckenham Park Estate and another building estate belonging to them called the Elmer's End Estate, continued the roadway across the meadow for the purpose of connecting their two estates. In 1896 the building society entered into an arrangement with the railway company whereby they released the company from the obligation of maintaining the level crossing, and thereupon the railway company removed the gates at the level crossing and substituted a high iron fence on each side of the railway. In the same year, 1896, the building society built over the road which they had made in 1893, and in 1897 they blocked up the roadway adjoining the plaintiff's premises by erecting a fence at the Mackenzie Road end of the roadway, and conveyed the two

KEKEWICH J.
1905
WHITE-HOUSE v. HUGH.

plots forming the site of the roadway to Anthony Willard, the owner of the house built on plot 355, No. 21, Mackenzie Road. In July, 1904, the defendant purchased from Willard this house and the two adjoining plots, and in November, 1904, he began to build two houses on these two plots and to dig up the roadway for the purpose of laying the foundation of these two houses. In January, 1905, the plaintiff issued the writ in this action. The plaintiff by his statement of claim alleged that it was part of the building scheme, which was binding on all purchasers of plots on the Beckenham Park Estate, that this roadway should continue to be used as a roadway and means of access to the plaintiff's premises, and further, that there had been a dedication of the roadway by the building society to the use of the public; and on both these grounds he claimed an injunction to restrain the defendant from excavating the road.

The plaintiff also claimed an injunction in respect of an alleged threatened interference with the plaintiff's ancient lights and in respect of an alleged letting down of the fence between the plaintiff's premises and the roadway by reason of the excavation of the road by the defendant; but as to these two points this case is not reported.

It was admitted that there had been no express dedication of the roadway by the society, but it was sought to prove dedication by public user. The evidence as to the public user of the roadway may be thus summarized. At the time when the plaintiff purchased his house he had no means of access to the roadway from the fence which separated his premises from the roadway, but shortly afterwards he made an opening in the fence which he closed by means of a sliding panel, and whenever he purchased loam or manure for the purposes of his business (which happened about once a month) he had it conveyed along the roadway in carts and shot into his garden through this opening. The roadway was also used for horses and carts by one Craker, who was formerly the owner of the meadow on the other side of the railway. The gates at the level crossing were secured by chain and padlock, and Craker and his workmen were supplied with keys. These gates were usually but not always kept locked. From

1882 to 1896 the roadway was used daily by laundrywomen who lived on the other side of the railway and had work on the Beckenham Park Estate. From 1890, when some new schools were opened on the other side of the railway, till 1896, the roadway was used by children going to school, and it was a favourite playground of the children in the neighbourhood. The roadway was also occasionally used by workmen and others as a short cut to the land on the other side of the railway.

Stewart-Smith, K.C., and *Ernest Todd*, for the plaintiff. (1.) There is here a building scheme binding on all purchasers of plots on the estate: *Collins* v. *Castle*. (1) It is part of this scheme that this roadway shall remain a roadway, and the power to vary the scheme upon which the defendant will rely cannot authorize him to build on this roadway. Although a mere restrictive covenant is not obnoxious to the rule against perpetuities—*Mackenzie* v. *Childers* (2)—a power to remove the restriction may be. This power to vary is to continue so long as the building society retain any part of the property, and on the authority of *London and South Western Ry. Co.* v. *Gomm* (3) it is void for remoteness. As to the general effect of a building scheme, we rely on the principles laid down by the House of Lords in *Spicer* v. *Martin*. (4) (2.) This roadway has been dedicated to the public and therefore the defendant cannot build upon it.

[*Lawrence, K.C.*, objected that the Attorney-General was a necessary party to the action.]

The presence of the Attorney-General is not necessary since we prove special damage.

[It was arranged that the case should be allowed to proceed without prejudice to the objection.]

P. O. Lawrence, K.C., and *Cozens-Hardy*, for the defendant. We rely upon the power to vary. It is no part of the building scheme that the plaintiff shall have any access to the roadway, nor is it possible to extract from the conveyance any warranty that there is a made road. The obligation, if any, arises merely from the plan; but this vacant space is not named as a road on

(1) (1887) 36 Ch. D. 243.
(2) (1889) 43 Ch. D. 265.
(3) (1882) 20 Ch. D. 562.
(4) (1888) 14 App. Cas. 12.

KEKEWICH J. 1905 — WHITE-HOUSE v. HUGH.

the plan, although all the other roads on the plan are named: it is not even called an intended road. When you have a plan and then a conveyance which is silent as to some of the features in the plan, the Court will not be astute to discover an implied obligation from the plan alone.

As to dedication, the plaintiff has failed to prove special damage, and therefore the Court cannot decide this point in the absence of the Attorney-General; but further, there is no public user amounting to dedication. There is no public right of way over the railway, and therefore this road is a cul-de-sac, and in the case of a cul-de-sac a dedication will not be presumed by mere public user without more: *Attorney-General* v. *Antrobus*. (1) Not only is there no express dedication, but the reservation of the power to vary is evidence of an intention not to dedicate: *In re Birmingham and District Land Co. and Allday* (2); *Sidney* v. *Clarkson*. (3)

Stewart-Smith, K.C., in reply. If the building scheme shews this road as a road, and the road is in fact made, the onus is on the vendors to shew that they can alter the status quo. It could not have been intended by the power to vary to allow this road to be built upon, because that would involve that all the roads on the estate might be broken up. The object of the power was merely to reserve to the vendors power to allow certain alterations in the houses—as to the height, and so forth.

Although no case can be found where a plan alone has been relied on as establishing a contract, there is no difference in principle whether the contract is evidenced by a plan or by conditions in the conveyance, and where land is laid out in accordance with a building scheme, the fair inference is that the purchasers buy their lots on the footing of that building scheme: *In re London School Board and Foster*. (4)

[*Lawrence, K.C.*, referred to *Heriot's Hospital* v. *Gibson*. (5)]

That case is distinguishable because here the road was actually in existence. As to dedication, the real question in *Attorney-General* v. *Antrobus* (1) was as to the jus spatiandi, and, further,

(1) [1905] 2 Ch. 188, 206.
(2) [1893] 1 Ch. 342.
(3) (1865) 35 Beav. 118.
(4) (1903) 87 L. T. 700, 704.
(5) (1814) 2 Dow, 301.

the dictum of Farwell J. does not touch this case, because this is not a case of mere user; it is user plus the making up of the road by the building society.

KEKEWICH J. The plaintiff asks for an injunction to restrain the defendant, who claims through the Birkbeck Freehold Land Society, from building on a plot of ground which has been laid out as a road. The plaintiff first puts his right on this. He says that when he purchased his house this plot of ground was a road, and was shewn to be a road by a plan, and that that road was then in the possession of the building society, who were bound to keep it as a road. The plaintiff rested his case mainly upon his own conveyance, but it was admitted in argument that he was entitled to go back to the conveyance of his predecessor in title, and I think that that is the proper date to take in determining the plaintiff's rights. I propose to put the plaintiff in Chamberlayne's shoes. The conveyance to Chamberlayne was dated July 18, 1878. It was on a printed form, and the property, of which there was a description in the body of the deed, was further described by reference to a printed plan. The conveyance was subject to certain conditions, but, with the exception of the sixth condition, these conditions do not touch the question whether there was a conveyance of the plaintiff's plot of land with a road on the boundary thereof. The sixth condition says: "The vendors will make the roads, and each purchaser shall pay his proportion of the expenses of keeping them in repair until the public authorities undertake the same." That is the only reference in the conditions to the roads. On the plan there are shewn certain roads properly so-called, viz., Pelham Road, Avenue Road, Ravenscroft Road, Birkbeck Road, and Mackenzie Road. On the construction of this condition it appears to me that the only roads there referred to are the roads properly so called.

The plot of land which has given rise to this dispute is not called a road on the plan, but is marked as a vacant space. Therefore it seems to me that there is nothing in the outset to shew that the plaintiff is entitled to have this vacant space reserved as a road. He pleads that it was to be a roadway

KEKEWICH J. 1905 WHITE-HOUSE v. HUGH.

and a means of access to his property. There is nothing in the plan or in the conveyance which indicates that there is to be any access to the property from that side. So far, therefore, I think that I have not to deal with a road, but with a vacant space of ground. This difference, to my mind, is very material in the consideration of the present case. The plaintiff says this was part of a building scheme. We have heard of the original building scheme and of its development. I propose to confine myself to the building scheme of 1875. I think it by no means immaterial to observe that all the plots on the plan are numbered by successive numbers, and that there is a hiatus between Nos. 352 and 355 which is occupied by the vacant space, and that if the two numbers 353 and 354 were supplied the hiatus would be filled up, and there would be a continuous numbering of the plots. The plaintiff says he is entitled to have this vacant space kept vacant, and he bases that contention on the ground of a building scheme binding on the vendors, because the defendant claims through the building society, and they are really defending this action. I asked counsel for the plaintiff whether he could find any case in which it had been held that a plan alone such as we have here was a sufficient ground for saying that the vendor could not alter what was proposed in that plan so as in this case to enable the vacant land to be built on. He was bound to admit that he knew of no such case. On the other hand, I have been referred to *Heriot's Hospital* v. *Gibson* (1), which seems to point the other way. The observations of Romer J. in *Tucker* v. *Vowles* (2) also seem to me to point the other way. In fact those observations almost amount to a decision on the point. Then I was referred to *In re London School Board and Foster* (3), about which I will only say that the judgments in the Court of Appeal do not encourage any difference from my own opinion that a plan by itself cannot be regarded as a representation that a particular mode of laying out or dealing with land must be followed without variation. A purchaser from a building owner is not entitled to say "On that plan you shew a vacant space, and therefore I can insist as part of my bargain that that vacant

(1) 2 Dow, 301. (2) [1893] 1 Ch. 195, 208.
(3) 87 L. T. 700, 704.

space shall remain vacant." I have looked at *Nottingham Patent Brick and Tile Co.* v. *Butler* (1), and other cases of that kind. They do not touch the particular point which I have to decide in this case, but they give one a guide as to what is meant by a building scheme. In all those cases a question arose as to enforcing a restrictive covenant, and the question was whether the covenant was binding as between the purchasers of the several lots, but in none of them was the question of the effect of a plan discussed. I hold against the plaintiff that there was here no representation that there was a road or that the vacant space would always remain vacant.

But, further, the conveyance, as I have said, was subject to certain conditions, and by the ninth condition "the vendors reserve to themselves the power of allowing a variation of the plans and conditions." In none of the cases which have come before the Court has there been a reservation of any power of that kind, but reference has been made to the possibility of sustaining such a reservation, and it has been assumed that it would be perfectly good. Now the relation between the parties in all these building scheme cases is contractual. The question is as to the enforcement of a bargain which is to be found in some statement or representation from which the Court has implied a contract that certain conditions shall be observed. Directly that conclusion is come to, the question is one of contractual relation, and if one of the parties has put in a reservation of power to alter the contract, then that reservation becomes part of the contract itself, whether that contract is expressed or implied. In other words, if the plaintiff is bound by part of the contract he is equally bound by the whole of it, including the reservation. The difficulty is to make the reservation fit in with the circumstances of this case. The ninth condition is not happily worded. The condition is that the vendors may allow others to make variations in the plans and conditions; not that they themselves may make variations. I do not think that this condition would enable the vendors to vary the plans and conditions to any extent they please. Take a critical instance. By the sixth condition the vendors must make

(1) (1886) 16 Q. B. D. 778.

KEKEWICH J. 1905 WHITE-HOUSE v. HUGH.

the roads specified in the scheme. It seems to me it would be impossible to allow the vendors to say, "We will not make the roads," or "We will not make all of them," or "We will make them differently," or "We will alter them when made." The language of the condition is not very apt, but I think that it means this: The vendors having represented that the houses should be built in a certain way, they might allow a purchaser to build in a different manner—as, for instance, two houses on a plot instead of one, or a shop instead of a dwelling-house, or to make other similar variations. If that is the meaning of it, why should they not allow a purchaser to build on this vacant space? The plaintiff's only answer to this is that at the time of the conveyance to him this was not strictly a vacant space, but was a road. It was made up imperfectly, but still in such a way that it was possible for vehicles to go along the road and for foot passengers to go along it on either side, although there was no definite path. True, it was not shewn as a road on the plan, yet it was a road in fact, and therefore, it is said, it must not be altered. In my opinion, that is not sufficient answer, unless the road was dedicated to the public. A mere private road may be converted into something else. It might have been converted into a playground or to any other purpose convenient to the vendors. I fail to see how the plaintiff can say that, because this road is made up as a road for all practical purposes, therefore it cannot be altered, If condition 9 means anything, it must mean that the vendors can, at their own pleasure, allow a variation of the scheme of the building. Therefore I hold against the plaintiff that he is not entitled, by reason of the fact that the road was actually in existence, to an injunction restraining the defendant from building houses upon it.

But then it is said that as a matter of fact the road has been dedicated to the public, and that having been once dedicated that is irrevocable, and the vendors cannot allow any building to be erected thereon to the detriment of the plaintiff. The point was taken whether the plaintiff could raise this question in the absence of the Attorney-General. He says there is an injury to him privately from the conversion of this road into something else, and in order to establish that he has endeavoured

to prove that he had an access to this road which would be interfered with. I assume, against my own opinion, that the plaintiff has proved special damage, and is therefore entitled to say that this is a public road. Let us see what this alleged road is. On the plan it is shown as a passage forty feet wide between Mackenzie Road and the London, Chatham, and Dover Railway, and it always was so. The line was there long before 1878. In my opinion it is important to consider what is the position of a road leading to a railway because that is very material in determining how far this ought to be treated as a public road. I do not say it is inconceivable that there should be a grant of a public right of way over a railway. But, so far as I know, that could not have come about without an Act of Parliament. What happens generally, if not always, is that a railway line is proposed to be laid out in such a way that it crosses a highway, and then with the sanction of Parliament certain general provisions come in. The traffic of the railway has to be considered, and the rights of the public have to be protected. But in such a case there is no grant by the railway of a highway, but there is a permission to the railway to cross a public highway. There is no dedication of any part of the line to the public use. If that is right there could not have been here a public right of way over the railway. We know as a fact that there was a private right of way over the railway. The result is that this passage was in the nature of a cul-de-sac. It is clear from the evidence that this right of way over the railway was a private right of way for the benefit of the owners and occupiers of the meadow on the other side of the railway. The building society having converted that land into building land, they no longer required that right of way and they released it to the railway company, so that it ceased. It is said that this passage has been converted into a public right of way by user. There is no evidence of any actual dedication by the building society, and although the road, so far as the road was made up at all, was made up by the building society, still they made it up merely as being a private right of way to the land on the other side of the railway. So that it comes merely to a question of user. In my judgment, the evidence of user is extremely weak. I think

KEKEWICH J. 1905 WHITE-HOUSE v. HUGH.

nothing of the precautions taken by the railway—whether the gates were kept locked or unlocked and so forth. It matters not whether boys and girls climbed over the gates when they came to the railway; they were on private ground, and it was not in the power of the building society to give any right to cross the railway. I have a distinct statement of the law upon this point by Farwell J. in *Attorney-General* v. *Antrobus*. (1) That seems to me to demolish the evidence of user. He says in no case has mere user by the public been held sufficient to constitute a dedication to the public of a cul-de-sac. Of course it is said that that statement must be regarded with reference to the facts before him, but this was a perfectly general statement of law, and was not dependent on the particular facts of that case. That authority is sufficient for me.

Therefore on the question of dedication it seems to me that the plaintiff's case breaks down and that he has not shewn that this vacant space has ever been converted into a public road.

[His Lordship then disposed of the claims as to the fence and as to the ancient lights, and dismissed the action.]

Solicitors: *James Powell*; *Rubinstein & Co.*

(1) [1905] 2 Ch. 188, 206.

H. B. H

KEKEWICH J.

1905

Dec. 7.

In re PARDOE. McLAUGHLIN *v.* PENNY.

[1904 P. 2346.]

Administration—Intestate's Estate—Statute of Limitations—"Present Right to receive the same"—Right to recover by Action at Law—Incapacity to sue Co-executor at Law—Suit in Equity—Law of Property Amendment Act, 1860 (23 & 24 *Vict. c.* 38), *s.* 13.

In 1864, a trust fund, payable to E. M. P. as the administratrix of the intestate appointee of the fund, was paid to E. M. P. and to her husband, G. P., in her right. E. M. P. was beneficially entitled to one moiety of the fund, and the other moiety was payable to E. M. P., G. P., and J. C. C. as the executors of M. C., in whose estate E. M. P. had a life interest. G. P. paid the money into his private banking account, and never accounted for or gave any acknowledgment in respect of it. G. P. died in 1884, J. C. C. in 1886, and E. M. P. in 1903. In an action by the administrator de bonis non of the appointee for a declaration that G. P.'s estate was liable to make good the portion of the fund unaccounted for, the executor of G. P.'s residuary legatee pleaded the statutory bar under s. 13 of the Law of Property Amendment Act, 1860:—

Held, that "a present right to receive" the share, within the 13th section, meant a right in the "person capable of giving a discharge" of recovering payment of the share into his own hands by an action at law, and that inasmuch as J. C. C. could not have sued his co-executors at law, there was, in 1864, no person who had a present right to receive the share in question, and consequently the statute had not run.

Binns v. *Nichols*, (1866) L. R. 2 Eq. 256, approved.

The fact that J. C. C. might, by a suit in equity against his co-executors for the administration of the appointee's estate, have secured to M. C.'s estate the share in question, did not constitute him a person to whom "a present right to receive the same" had accrued, within the meaning of the section.

Action.

By virtue of an indenture of settlement dated March 4, 1825, and a deed poll of appointment dated January 25, 1850, James Fielder Croome became absolutely entitled to a sum of 5,000*l.*, forming part of the trust funds comprised in the settlement, subject only to the life interest therein of his mother, Mary Croome. He died a bachelor and intestate on November 15, 1853, leaving as his only next of kin his mother and his sister

KEKEWICH J. 1905 PARDOE, *In re.* MCLAUGHLIN *v.* PENNY.

Elizabeth Mary Pardoe, the wife of George Pardoe. Letters of administration of his personal estate were granted to his mother on February 6, 1854.

Mary Croome died on November 11, 1862, having by her will appointed Elizabeth Mary Pardoe, George Pardoe, and James Capel Croome her executors, and bequeathed her share in her deceased son's estate to her executors upon the trusts therein mentioned under which Mrs. Pardoe took a life interest for her separate use without power of anticipation. The will was duly proved by all the executors.

On December 28, 1863, letters of administration de bonis non of the personal estate of James Fielder Croome were granted to Mrs. Pardoe.

In 1864, the trustees of the settlement paid the sum of 5000*l.* above mentioned to Mrs. Pardoe as administratrix of her brother, and to G. Pardoe in her right. G. Pardoe paid the money into his private account, and, with the exception of various payments amounting in the aggregate to the sum of 852*l.* 12*s.* 8*d.* made on account of the estate of James Fielder Croome, never accounted for or paid to the said estate any part of the said sum of 5000*l.* or gave any acknowledgment in respect of the same.

G. Pardoe died on November 29, 1884, having by his will appointed his wife his sole executrix, and given all his real and personal estate to his wife for her life, and after her death to his brother Frederick Pardoe.

J. C. Croome died in 1886.

Frederick Pardoe died on December 20, 1892, having by his will appointed executors of whom the defendant Arthur Penny was the survivor.

Mrs. Pardoe died on July 15, 1903, having appointed the plaintiff and the defendant James Samuel Penny her executors, by both of whom her will was duly proved.

On October 24, 1904, letters of administration de bonis non of the personal estate of James Fielder Croome were granted to the plaintiff.

The plaintiff subsequently commenced this action against the defendants J. S. Penny and A. Penny for (inter alia) a declaration that the estate of G. Pardoe was liable to make good to the

estate of James Fielder Croome so much of the said sum of 5000*l.* as had not been accounted for.

Among other defences to the action, the defendant relied upon s. 13 of the Law of Property Amendment Act, 1860 (1), as a bar to the claim in question.

Ingpen, K.C., and *P. M. Walters*, for the defendant Arthur Penny. The plaintiff's claim is barred by virtue of the provisions of s. 13 of the Law of Property Amendment Act, 1860. (1) In 1864 there were persons in existence, namely, Mrs. Croome's executors, to whom a present right to receive the share of the 5000*l.* due to her estate had accrued, and who were capable of giving a good discharge for the same within the meaning of the section. The money passed into the hands of Mrs. Pardoe as administratrix, and of her husband in her right. He was in the same fiduciary position as his wife, and for present purposes must be treated as administrator and entitled to plead the statute.

We submit that the section is not necessarily confined to an action at law, but may extend to a suit in equity. J. C. Croome could have obtained payment of the share due to Mrs. Croome's estate if he had commenced an action for the administration of the estate of James Fielder Croome with Mr. and Mrs. Pardoe as defendants. That is quite enough to satisfy the requirements of the section and cause the statute to begin to run in 1864 in favour of Pardoe and his estate.

Stewart-Smith, K.C., and *Cann*, for the plaintiff. The plaintiff's claim is not statute barred. There never has been anyone in whom a present right to receive the share existed other than Mr. and Mrs. Pardoe and J. C. Croome jointly, and J. C. Croome could not sue his co-executors at law. *Binns* v. *Nichols* (2) shews

(1) The material provisions of s. 13 of the Law of Property Amendment Act, 1860, are as follows: "No suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same. . . . ."

(2) L. R. 2 Eq. 256.

KEKEWICH J. 1905 PARDOE, *In re.* MCLAUGHLIN *v.* PENNY.

that where the persons to pay and the persons to receive are the same, there can be no question of any Statute of Limitations. The section contemplates that the present right to receive shall be a right that can be established by an action at law to have the money paid into the hands of the person capable of giving a receipt for the same. It is true that by a suit in equity, as suggested, the share could have been secured to Mrs. Croome's estate, but J. C. Croome would not even then have been entitled to take the money out of the hands of his co-executors, and so a suit of that nature would not be sufficient to make the statute begin to run.

Ingpen, K.C., in reply. Even if *Binns* v. *Nichols* (1) is still law, that case does not apply, because the ground of the decision was that there was only one person liable to pay and the same person to receive. In this case that is not so.

Cruickshank, for the defendant J. S. Penny.

KEKEWICH J. This is a small but interesting point, and it is strange that no decision is to be found directly bearing upon it. The statute begins to run from the moment when a present right to receive the personal estate, which also includes a share of the personal estate, shall have accrued to some person capable of giving a discharge for or release of the same. One has to ascertain that moment. It is not suggested that any moment can be substituted for the actual day in 1864 when the sum of 5000*l.* was paid over to Mr. and Mrs. Pardoe, in their character as the legal personal representatives of James Fielder Croome. I do not forget that Pardoe was one of the executors of Mrs. Croome, or that he was the husband of Mrs. Pardoe, and that according to the then law he had rights by virtue of that relationship; but to avoid complication, I will drop her out altogether and consider Pardoe as being the administrator of James Fielder Croome and also one of the executors of Mrs. Croome. It will not make the slightest difference to the result. All I have to say will be equally sound or unsound when Mrs. Pardoe is added to her husband.

This sum of 5000*l.*, then, was paid to him in 1864. Part

(1) L. R. 2 Eq. 256.

of that money in due course of administration belonged to Mrs. Croome's estate, and her executors were then entitled to sue for it if they could. Now how was that to be? Mrs. Croome's executors were Pardoe and J. C. Croome. Pardoe himself was the administrator of James Fielder Croome, out of whose estate the money was to come. J. C. Croome and Pardoe, of course, could not sue Pardoe at law, but it would have been easy to have framed a suit in equity with J. C. Croome as plaintiff, suing Pardoe as the administrator of James Fielder Croome, and to have asked for administration of James Fielder Croome's estate and that the money due to Mrs. Croome's estate might be secured. There would have been no difficulty about that. But does that carry the matter far enough? The section says: "No suit or other proceeding shall be brought . . . . but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." Now J. C. Croome, as one of the executors of Mrs. Croome, could have given a legal discharge for a share of the personal estate to any person who paid it over to him alone. Therefore, so far, J. C. Croome was a person within the section. But the section contemplates that the person to give the receipt shall be not only "capable of giving a discharge for or release of the same" but shall be also a person to whom "a present right to receive the same shall have accrued." It seems to me that "a present right to receive the same" means a right to recover by legal proceedings. It does not merely mean this, that if the receipt be given it will hold good against all the world. It means that the person who is to give the receipt can maintain legal proceedings in order to establish the right. I cannot conceive that the words can mean anything different from that, and that view is, in my opinion, supported by *Binns* v. *Nichols*. (1) Mr. Ingpen seemed to suggest that the decision in *Binns* v. *Nichols* (1) is not law now, but I venture to think that, in the absence of anything to the contrary, it would be rather strengthened than weakened by subsequent cases. The head-note to the report of that case contains this statement: "Where the person liable for the payment of a legacy, and the person entitled to receive it, are the

(1) L. R. 2 Eq. 256.

KEKEWICH J. 1905 PARDOE, *In re.* MCLAUGHLIN *v.* PENNY.

same, no question of limitation under the statute can arise." "Entitled to receive it" of course is an equivalent expression for what the statute calls "the present right to receive the same," a right, that is, which can be established by proceedings at law. Now J. C. Croome could in equity have done what I have said, but when he had obtained a decree, worked out the accounts and inquiries and ascertained what Mrs. Croome's share in James Fielder Croome's estate was, the case would come on for further consideration, and what would have happened? J. C. Croome would have asked for payment to him, and, of course, Pardoe would have resisted that, and it would have been such a plain case that it really would not have been arguable. J. C. Croome would have had no right to recover that as against Pardoe. They were both executors of Mrs. Croome, and J. C. Croome could not have insisted on receiving it himself as against his co-executor. Therefore, at that time, though he could have done a good deal in the way I have pointed out, he would have had no present right to receive the share of personal estate in the sense of having a right to recover it by legal proceedings into his own hands.

It seems to me therefore that the statute did not begin to run in 1864. It is not suggested that it began to run at any other time, and therefore it has not run now.

The result is that this particular defence does not avail Pardoe's estate.

Solicitors: *Charles Sawbridge & Son; Walters & Co.*

R. M.

FARWELL J.
1905
Dec. 7.

In re W. C. HORNE & SONS, LIMITED. HORNE *v.* W. C. HORNE & SONS, LIMITED.

[1904 W. 1853.]

Company—Debenture-holder's Action—Surplus Assets—Plaintiff's Costs—Difference between Party and Party and Solicitor and Client Costs—Plaintiff unable to Pay such Difference—Plaintiff's Solicitor's Costs, Charges and Expenses—Receiver's Costs—Property Recovered or Preserved—Charging Order—The Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28 *—Form of Order—Practice.*

In a debenture-holder's action a receiver was appointed, and the same solicitor acted for the plaintiff and for the receiver. In the course of realizing the estate proceedings were taken at home and abroad with the sanction of the Court, and the solicitor was employed by the receiver for these purposes. In the result property was recovered or preserved, and the funds paid into Court were sufficient to pay all the debenture-holders in full and to leave a large surplus for the liquidator of the company. The plaintiff being unable to pay the difference between party and party and solicitor and client costs of the action :—

Held, that the solicitor was entitled to a charging order for such difference upon so much of the funds as belonged to the debenture-holders.

Dictum of Kay J. in *Harrison* v. *Cornwall Minerals Ry. Co.*, (1884) 32 W. R. 748 ; 53 L. J. (Ch.) 596, followed :—

Held, further, that the solicitor was also entitled to a charging order upon the balance of the funds that would be payable to the liquidator for his costs of recovering and preserving assets at home and abroad, which really were part of the receiver's costs of administration and might have been included in his accounts.

Adjourned Summons.

In February, 1904, the above-mentioned company went into voluntary liquidation, and a Mr. Pattullo was appointed the liquidator. On June 6, 1904, the plaintiff, J. C. Horne, who was the holder of one debenture of 50*l.* of the company, commenced this action on behalf of himself and all other the debenture-holders of the company to enforce and realize the debentures. On June 10, 1904, the usual judgment was pronounced, and Mr. Pattullo was appointed the receiver and manager. In May, 1905, a dividend of 15*s.* in the pound was paid to the debenture-holders, but no order as to costs was then made.

FARWELL J. 1905 W. C. HORNE & SONS, LIMITED, *In re.* HORNE v. W. C. HORNE & SONS, LIMITED.

During the course of the proceedings three actions were brought in the High Court and three actions in the county court, all of which were successful; a claim by a workman for compensation was satisfactorily settled without payment of costs; seven actions brought against the company in Germany were successfully defended; and a working agreement with an American company was negotiated, under which profits were realized. All these matters were carried out with the sanction of the Court, and in all of them Mr. Honey was the solicitor employed by the receiver. In the result property was recovered or preserved amounting altogether to more than 2000*l.*, and the funds now in Court and in the hands of the receiver were sufficient to pay the remaining 5*s.* in the pound to the debenture-holders, and to leave a large surplus for payment to Mr. Pattullo, as liquidator, for distribution amongst the ordinary creditors of the company. The receiver had not carried in his final account.

Mr. Honey took out a summons for a charging order on the fund in Court—(1.) for the difference between the party and party and solicitor and client costs of the action; and (2.) for his costs, charges and expenses of all the above-mentioned proceedings. It appeared from the evidence that the plaintiff was a commercial traveller in poor circumstances and quite unable to pay any of these costs.

The summons now came on for hearing with the further consideration of the action.

Waggett, for the summons. The application is made with a view to get over the difficulty caused by the rule that the plaintiff in a debenture-holder's action is only allowed party and party costs of the action: *In re Queen's Hotel Co., Cardiff, Ld.* (1); although it has since been held in *In re New Zealand Midland Ry. Co.* (2) that, where the assets are insufficient, the plaintiff is entitled to solicitor and client costs. The charge is a charge in the nature of salvage, and may be enforced against the interests of other persons in the property recovered or preserved: *Greer* v. *Young* (3); *Pinkerton* v. *Easton* (4);

(1) [1900] 1 Ch. 792.
(2) [1901] 2 Ch. 357, 368—369, 371.
(3) (1883) 24 Ch. D. 545, 548, 552.
(4) (1873) L. R. 16 Eq. 490.

Scholey v. *Peck* (1); *In re Knight* (2); *In re Pelsall Coal and Iron Co.* (3) Under the circumstances Mr. Honey ought to have a charge for his costs, charges and expenses—following the language of the Act—on the whole fund recovered or preserved: first, as solicitor of the plaintiff, for the difference between the party and party and solicitor and client costs of the action; and next, for his costs, charges and expenses of all the proceedings at home and abroad, as part of the receiver's costs of realizing the estate. In *Harrison* v. *Cornwall Minerals Ry. Co.* (4) Kay J. refused to make a charging order, but said: "If there were any question as to the solicitors not obtaining their costs I should not hesitate to make the order." Here there is evidence that the plaintiff is unable to pay these costs. I admit it is a question of discretion, but there is nothing in *In re Queen's Hotel Co., Cardiff, Ld.* (5), that interferes with the common law right of a solicitor to a charge for his costs, and the point now taken was not raised in that case.

J. M. Stone, for the company. If this charging order is made, it will be altering the rule laid down in *In re Queen's Hotel Co., Cardiff, Ld.* (5) The Legislature only intended s. 28 of the Act to be used as a convenient mode of enforcing the common law lien of solicitors, and never contemplated its being applied in the manner now suggested. The words "recovered or preserved" mean recovered or preserved in the action *from* the defendant in the action, not *for* the defendant. It there had been no debenture-holder's action, the liquidator might have recovered all this property himself.

[FARWELL J. A large part of these costs seem to me to be part of the receiver's expenses of administration and management, and should, I think, have een included in his accounts, in which case the company would have had to pay them. I think it is not too late to direct them to be included in the receiver's final account.]

Waggett referred to *In re Hill.* (6)

(1) [1893] 1 Ch. 709.
(2) [1892] 2 Ch. 368.
(3) (1892) 8 Times L. R. 629.
(4) 32 W. R. 748, 749; 53 L. J. (Ch.) 596.
(5) [1900] 1 Ch. 792.
(6) (1886) 33 Ch. D. 266.

FARWELL J.
1905
W. C. HORNE & SONS, LIMITED, *In re.*
HORNE *v.* W. C. HORNE & SONS, LIMITED.

Shebbeare, for the plaintiff, supported the application, and referred to *Charlton* v. *Charlton* (1) and *In re Murnaghan*. (2)

FARWELL J. The plaintiff in this debenture-holder's action has been so successful that he has recovered assets more than sufficient to pay all the debenture-holders in full and to leave a large surplus for the company. According to the usual practice of the Court, however, he cannot get his solicitor and client costs of the action because of the rule which gives him such costs only when the estate is insolvent. The principle is explained by Stirling L.J. in *In re New Zealand Midland Ry. Co.* (3), where, after referring to Kindersley V.-C.'s judgment in *Thomas* v. *Jones* (4), he goes on to say (5): "The only difficulty which arises with reference to whether the practice rests on principle or not appears to me to be this, that Courts of Equity have not been quite logical in following out the principle which was laid down by Kindersley V.-C. If it were true that in all cases where a creditor has, for the benefit of all the other creditors, instituted a suit and recovered a fund he should get his costs as between solicitor and client, and not as between party and party only, it would seem logical that the rule ought to apply where the fund recovered is sufficient to pay the debts in full. The plaintiff creditor would not, indeed, be entitled to get those costs as against the representative of the deceased, or out of his estate; but, inasmuch as the creditors come in and get the benefit of the action, it would seem right that the plaintiff, if this rule be founded on principle, should get them out of the fund which has been acquired by his exertions for the benefit of all the creditors—that is to say, that they should be taken in the first instance out of the fund which is available for payment of the creditors' debts, and then the balance distributed rateably among the creditors." He then deals with two cases said to be based on special circumstances, and continues: "That is really the only difficulty. In other respects, the principle stated by Kindersley V.-C. is a most reasonable one, namely, that where the

(1) (1883) 32 W. R. 90; 52 L. J. (Ch.) 971.
(2) [1903] 2 I. R. 287.
(3) [1901] 2 Ch. 357.
(4) (1860) 1 Dr. & Sm. 134.
(5) [1901] 2 Ch. 368.

fund recovered proves insufficient for payment of all the creditors in full, or of the class of persons represented by the plaintiff in full, the plaintiff should be entitled to an indemnity from the persons that he represents in respect of the costs which he has incurred on their behalf, and should therefore have his costs as between solicitor and client and not as between party and party." Now, it is obvious that I cannot disregard the rule settled by *In re Queen's Hotel Co., Cardiff, Ld.* (1), by ordering any direct payment to the plaintiff of his solicitor and client costs of the action out of the funds of the company or out of the funds recovered for the debenture-holders, but s. 28 of the Solicitors Act, 1860, as construed by the authorities, especially *Greer* v. *Young* (2), enables the Court to give a solicitor employed "in any suit, matter, or proceeding" a charge upon the property recovered or preserved through his exertions for his "taxed costs, charges and expenses of or in reference to such suit, matter or proceeding." Am I, then, justified in using this jurisdiction in order to enable the solicitor of the plaintiff in the present case to recover for himself that which the plaintiff could not himself have recovered, namely, the difference between the party and party and solicitor and client costs of the plaintiff, there being evidence before me that the plaintiff will be unable to pay that difference? I am assisted by what is said by Kay J. in *Harrison* v. *Cornwall Minerals Ry. Co.* (3): "The plaintiffs' solicitors now come, under this statute, which was passed for the benefit of attorneys and solicitors, asking that the difference between party and party costs and the solicitor and client costs which have not been ordered to be paid out of this fund shall be charged upon it. The plaintiffs are men of good position, and there is no suggestion that they are unable to pay these costs, and I may therefore assume that the solicitors are in no danger of losing them, so that it really makes no difference to them whether this order is made or not. I tested this during the argument by suggesting to Mr. Stirling that he should take an order for a charge in case the applicants should be unable to obtain payment from their clients, but he declined

(1) [1900] 1 Ch. 792.
(2) 24 Ch. D. 545, 548, 552.
(3) 32 W. R. 748; 53 L. J. (Ch.) 596, 597.

FARWELL J. 1905 W. C. HORNE & SONS, LIMITED, *In re.* HORNE *v.* W. C. HORNE & SONS, LIMITED.

to take an order in that form. It is quite clear, therefore, to me that this is not in fact an application by the solicitors, but by the plaintiffs themselves, who are seeking to get the difference between the party and party and solicitor and client costs paid out of the fund. That is not a purpose for which this Act was intended. It was meant solely for the benefit of solicitors, and not for that of their clients. It was no doubt intended to give the Court the widest possible discretion; and if it were suggested that there was the least danger of these solicitors not getting their costs, I should not hesitate to make the order." In the case before me I have evidence that the plaintiff is unable to pay these costs, so that the applicant will not get them unless he obtains a charging order. The case therefore falls exactly within the exception mentioned by Kay J., and I will follow his dictum. I cannot, however, give him a charging order on the whole fund at the expense of the company. The charge for the difference between the party and party and solicitor and client costs of the action must be a charge for his costs, charges and expenses upon so much of the fund in Court as is allotted to the debenture-holders, and must be strictly limited to the costs of proceedings in the action as distinguished from matters not being steps in the action. These costs will probably be confined to costs in the action down to the time of the judgment, and will be of small amount. Then come his other and larger costs, charges and expenses: I mean the costs of the actions in the High Court and in the county court, and of the proceedings in Germany, and of the other matters that have been mentioned. These costs, as I pointed out during the argument, are really part of the receiver's expenses of administration and management, and ought to have appeared in his accounts as part of his costs. As regards all these costs, I think the applicant is entitled to a charging order on the balance of the fund in Court that will ultimately be available for payment to the liquidator of the company, in accordance with the ordinary practice of the Court that they who take the benefit of realization must pay the costs of it: I mean the costs of all the proceedings that were authorized by the Court, which will be taxed as between solicitor and client, and I observe that a similar

direction was given by Kekewich J. in *In re New Zealand Midland Ry. Co.* (1) There may be a little difficulty in drawing up the order, but I think the difficulty will disappear if the receiver, when he brings in his final account, includes these costs as part of his costs, charges and expenses, and they will then come before the master and be dealt with by him in due course. As the charge I have given the solicitor for the difference between the party and party and solicitor and client costs of the action on the fund available for distribution amongst the debenture-holders is in effect for the benefit of the plaintiff and against the interests of the other debenture-holders, the registrar must be satisfied that the other debenture-holders do not wish to be heard in opposition to the order. It will probably be sufficient if a consent brief on their behalf is produced to him.

NOTE.—The order, upon the summons and further consideration, as passed and entered, was as follows:—

"The application by summons dated, &c. of F. H. Honey, for &c., and the application of the plaintiff by summons, for &c., coming on this day to be heard, &c. This Court doth order that J. D. Pattullo, the receiver and manager appointed by the judgment dated the 10th June, 1904, be discharged. And it is ordered that he do pass his final account as such receiver and do within fourteen days after the master's certificate of the allowance of such account pay the balance (if any) which shall be certified due from him into Court as directed in the Lodgment and Payment Schedule hereto. And it is ordered that thereupon the recognizance and bond both dated, &c. . . . . be vacated. And it is ordered that it be referred to the taxing master to tax the costs of the plaintiff of this action as between party and party and also as between solicitor and client and to certify the difference, and to tax as between solicitor and client the costs, charges and expenses of the said F. H. Honey as such solicitor of and in reference to this action, and of recovering and preserving the assets of the defendant company not included in the said costs of the plaintiff, and including in the costs of the said F. H. Honey his costs of and incident to his application by summons dated, &c., and in such taxation the taxing master is to debit the said F. H. Honey with all sums of money (if any) by him received of or on account of the plaintiff or the receiver in respect of the said costs, charges and expenses, and to certify the balance of the said costs of the said F. H. Honey. And it is also referred to the taxing master to tax as between solicitor and client the costs of the plaintiff and of the said J. D. Pattullo as liquidator, of the said application F. H. Honey in chambers and occasioned by the adjournment thereof into Court, and also the costs of the said liquidator of this action as

---

(1) [1901] 2 Ch. 357, 371.

FARWELL J.
1905
W. C. HORNE & SONS, LIMITED, *In re.*
HORNE
v.
W. C. HORNE & SONS, LIMITED.

from the 23rd June, 1905. And it appearing from the said affidavit of, &c., that the portion of the funds in Court attributable to a final dividend of 5*s* in the £ upon the principal amount of the debentures and the arrears of interest thereon together with further interest to the day of is the sum of £ . This Court doth declare that the said F. H. Honey is entitled to a charge upon the said sum of £ for the amount of the difference between the plaintiff's said costs as between party and party and solicitor and client hereinbefore directed to be certified, and is also entitled to a charge upon the residue of the funds in Court and to be lodged as hereinbefore directed for his costs to be taxed under this order. And it is ordered that the funds to be lodged and the funds in Court be dealt with as directed in the said schedule. And any of the parties are to be at liberty to apply."

Solicitors: *F. H. Honey; Baillie & Co.*

H. L. F.

FARWELL J.
1905
Nov. 21, 22, 23, 28, 29, 30; *Dec.* 1, 5, 12.

MANCHESTER CORPORATION *v.* NEW MOSS COLLIERY, LIMITED.

[1904 M. 2225.]

Mines—Waterworks—Reservoir—Lands purchased by Agreement, together with Mines—Right to support from Minerals under adjacent Land—Limit of Forty Yards—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18—27.

When land is taken for the purpose of constructing waterworks under a special Act, which incorporates the Waterworks Clauses Act, 1847, the rights of the undertakers to support from minerals, whether subjacent or adjacent, and whether within or without the statutory limit of forty yards, are governed by ss. 18 to 27 of the Waterworks Clauses Act, and the rights defined by those sections are in substitution for, and exclude any rights they might have had at common law. It makes no difference whether the land is taken under compulsory powers, or by agreement, or whether the surface is purchased alone or the minerals are purchased with it.

In 1875 a corporation purchased land from S. and other adjoining land from T., for the purpose of constructing a reservoir. Both the conveyances contained recitals that the corporation had agreed to purchase pursuant to the powers given them by a special Waterworks Act, which incorporated the Lands Clauses Consolidation Act and the Waterworks Clauses Act, but the purchases were made by agreement, without putting into force any compulsory powers. The conveyance from reserved all minerals, with power to work them without paying any compensation for damage done to the surface. The conveyance from T. included the minerals and all his right and interest in the land. The defendants were lessees from S. of the minerals under the lands bought from him, and other lands, and had given notice to the corporation, under the Waterworks Clauses Act, of their intention to work the coal adjacent to and under the lands bought from S. The corporation

gave no notice of willingness to pay compensation. The defendants continued their workings and thereby caused subsidence of the surface of the land bought from T. This was in part caused by workings more than forty yards from the land injured. The corporation brought this action to restrain the defendants from working so as to let down the lands bought from T. They relied on their common law rights as owners to support from the adjacent land :—

Held, that the rights of the corporation were governed wholly by the Waterworks Clauses Act, 1847, and they had no right to lateral support from any minerals for which they had not paid or been willing to pay compensation under the Act, whether the minerals in question were within or without the limit of forty yards.

THIS action was brought by the Corporation of Manchester for an injunction to restrain the defendants, a colliery company, from working coal mines so as to cause damage to lands of the plaintiffs in the townships of Denton, Audenshaw, and Gorton, in the county of Lancaster.

The lands in question formed part of the land on which the corporation had constructed, for the purposes of their waterworks, a large reservoir, known as the Audenshaw reservoir.

The corporation acquired the greater part of the lands on which the reservoir was made—viz., 246 acres, 3 roods, 31 poles—from the Earl of Stamford and Warrington. This land was conveyed to the corporation by a deed dated January 13, 1875, by which, after a recital that the corporation, pursuant to all and singular the powers enabling them in that behalf, including particularly the powers contained in the Manchester Corporation Waterworks Act, 1847, wherewith was incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, had agreed with the said Earl for the purchase of the lands in question, except as thereinafter mentioned, the Earl conveyed the lands to the corporation in fee, " excepting and reserving unto the Earl, his heirs and assigns (but without prejudice to the clauses in that behalf contained in the Waterworks Clauses Act, 1847), all mines, veins, beds, and delphs of coal and cannel and such clay minerals and other strata as it may be necessary or expedient to remove in order to get such coal and cannel, within or under the said hereditaments thereby assured, with full liberty by means of pits or shafts to be situated elsewhere than upon the same land and premises to mine, win, work, take and carry away

FARWELL J. 1905 MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

all or any of the minerals aforesaid without making compensation for any damage done to the said land or buildings, reservoirs or works for the time being thereon by reason of the getting or working of any such mines, veins, beds, or delphs under the same or under any other hereditaments."

Other part of the land on which the reservoir was erected, viz., 23 acres, 3 roods, 39½ poles, which was adjacent to and surrounded on three sides by the land bought from Lord Stamford, was acquired from John Taylor and conveyed to the corporation by a deed dated July 1, 1875, by which, after a recital exactly similar to that in the conveyance to Lord Stamford, John Taylor granted and conveyed "unto the said mayor, aldermen, and citizens, their successors and assigns, the hereditaments described in the schedule and all the estate, right, title, interest, property, claim and demand whatsoever of the said John Taylor or which he can grant or convey in, to or out of the said hereditaments and premises." The description in the schedule set out the parcels "together with all and singular ways . . . . mines, minerals, delphs, quarries . . . . easements, privileges . . . . and appurtenances to the several messuages, lands, and hereditaments hereinbefore described . . . . belonging or in any wise appertaining."

Later in the year 1875 the corporation obtained another special Waterworks Act, incorporating the Waterworks Clauses Act and the Lands Clauses Consolidation Act. The Audenshaw reservoir was in fact constructed under the powers of this Act. Both the Stamford lands and the Taylor lands were mentioned in the schedule to this Act, and a confirmatory conveyance was executed by Lord Stamford after the passing of the Act. No further conveyance was executed by Taylor.

The defendants duly completed their reservoir partly on Stamford land and partly on Taylor land, part of the northern embankment being on Taylor land. The works were completed more than twenty years before the commencement of this action. The defendants were the lessees, under two separate leases, of coal under lands of Lord Stamford, including the coal under the reservoir. On April 21, 1899, as the defendants' workings under one lease were approaching the reservoir, they gave notice, under

the Waterworks Clauses Act, to the plaintiffs of their intention to work certain mines adjacent to and under the reservoir, and on July 24, 1903, they gave a further notice of their intention to work other mines adjacent to and under the reservoir which were comprised in their other lease. The plaintiffs did not, in either case, give a counter-notice under the Act of their willingness to pay compensation for the minerals the defendants proposed to work.

The defendants continued to work the mines under the Stamford lands, and thereby caused subsidence of part of the Taylor land, and consequent damage. It was not alleged that they had done any wilful damage or worked in an improper manner. It was proved that the seams of coal were very deep and on the dip, at a steep incline, and consequently the area of disturbance was very large, and that subsidence had been caused partly by workings within and partly by workings beyond the limit of forty yards prescribed by the Waterworks Clauses Act, 1847; and also that the subsidence would have taken place to an equal extent if the waterworks had not been there. Neither of the special Waterworks Acts of the corporation prescribed any special limit of distance in place of the forty yards.

The statement of claim merely stated that the plaintiffs were owners in fee simple, and they claimed that they had all the rights of support from minerals under adjacent lands which Taylor had or an ordinary purchaser from him would have had.

The defendants contended that the case was governed by the fasciculus of sections relating to mines (18—27) in the Waterworks Clauses Act, 1847, and that the rights given by those sections were in substitution for any common law rights. (1)

(1) The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17):—

"And with respect to mines be it enacted as follows:

"18. The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Sects. 19, 20, and 21 provide for the undertakers making and depositing plans of their underground workings,

FARWELL J. 1905

MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

Moulton, K.C., Jenkins, K.C., and *H. F. Moulton*, for the plaintiffs. The plaintiffs' claim is to restrain the defendants from

---

and for the inspection thereof by persons interested.

"22. Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be under ground, and shall be described in the map or plan which shall be so kept and deposited as hereinbefore mentioned, or within the prescribed distance, if any, and if no distance be prescribed within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give the undertakers notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected by any person appointed by them for the purpose, and if it appears to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the undertakers and such owner do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation.

"23. If before the expiration of such thirty days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, and to drain the same, by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner; and if any damage or obstruction be occasioned to the works of the undertakers by the working of such mines in an unusual manner the same shall be forthwith repaired or removed (as the case may require,) and such damage made good, by the owner, lessee, or occupier of such mines or minerals, and at his own expense, and if such repair or removal be not forthwith done, or if the undertakers shall so think fit, without waiting for the same to be done by such owner, lessee, or occupier, it shall be lawful for the undertakers to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby by action in any of the superior courts."

Sect. 24 provides for making airways and other communications through the strata which the mine-owner was prevented from working; s. 25 provides for compensation for severance of minerals; and s. 26 gives the undertakers power to inspect mines.

"27. Nothing in this or the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed or maintained by virtue of this Act or the special Act."

working the minerals under the Stamford land so as to cause subsidence of the surface of the Taylor land and damaging the plaintiffs' reservoir, and compensation for damage. The plaintiffs cannot claim any relief in respect of damage done to their works on the Stamford lands, because Lord Stamford reserved the right to work the minerals without paying compensation for injury to the surface. But that is only a reservation of such rights as he had; it could not give him a right to let down Taylor's land by depriving it of adjacent support, for he had no such right. The plaintiffs acquired all Taylor's rights, including that to support from the minerals under adjacent lands.

The main defence appears to be that the company are entitled to work these minerals by virtue of the Waterworks Clauses Act, ss. 18 to 27. But those clauses simply provide that the undertakers of waterworks may purchase the surface alone without the minerals, and then, when the owner of the minerals wants to work them, may stop his doing so on paying compensation for any minerals which he had a right to work, and the working of which the undertakers prevent. The whole scheme of the sections is to provide compensation for rights taken away; they cannot give the owner of minerals any new rights. That is shewn by s. 23, which provides that, if the undertakers do not give notice that they will compensate, the owner may work these minerals "as if this Act and the special Act had not been passed." Those words are not in the Railways Clauses Consolidation Act, and were introduced, we submit, to remove any doubts, which might exist, whether the clauses gave the owner any new right. If the Act had not been passed the defendants could not have worked the mines so as to deprive Taylor of his common law right to lateral support. The plaintiffs have not availed themselves of these clauses to buy the surface of Taylor's land without the minerals. They have bought surface and minerals together, and stand exactly in Taylor's shoes. The defendants could not let down his land when it was his; they cannot now it is the plaintiffs. They purchased by agreement, and did not use compulsory powers.

The plaintiffs' case rests simply upon their common law rights as freeholders; the waterworks clauses apply only to

FARWELL J. 1905 MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

compensation. Here there is nothing for which Lord Stamford can claim compensation; the plaintiffs have not deprived him of any right.

Great Western Ry. Co. v. *Bennett* (1) decided that if a railway company took the surface without the minerals, they acquired no implied right to support. *Pountney* v. *Clayton* (2) goes no further. It only decides that a purchaser from a railway company, who had purchased the surface without the minerals, had not proved his title to any support. It has never been decided or suggested that a waterworks company purchasing by agreement a piece of land with the minerals in fee simple did not get all the rights of the vendor. The plaintiffs have, therefore an absolute right to prevent the defendants letting down their land. There are buildings upon it, and if they are injured by the defendants' letting down the land, the plaintiffs are entitled to damages for that injury, unless, which it will be proved is not the case, the weight of the buildings contributed to the letting down: *Stroyan* v. *Knowles* (3); *Attorney-General* v. *Conduit Colliery Co.* (4)

Neville, K.C., Upjohn, K.C., and *MacSwinney*, for the defendants. The sections (18, 22, 23) of the Waterworks Clauses Act, 1847, are in effect precisely the same as the sections relating to minerals (ss. 77, 78, 79) in the Railways Clauses Act, 1845. Sect. 27 is added to protect the mineowner from the danger of flooding which does not exist in the case of railways. The addition in s. 23 of the words "as if this Act had not been passed" make no difference to the meaning. The Acts introduce a complete code as to minerals with regard to railway and waterworks undertakers. The rights given by this code are not in addition to, but in substitution for, the rights which the undertakers might have as owners at common law. When land is taken for the purposes of a special Railway or Waterworks Act the code applies. It makes no difference whether the land is purchased under compulsory powers or by agreement, or whether the surface is purchased alone or together with the minerals. In every case the code applies. It gives the undertakers the great advantage

(1) (1867) L. R. 2 H. L. 27.
(2) (1883) 11 Q. B. D. 820.
(3) (1861) 6 H. & N. 454.
(4) [1895] 1 Q. B. 301.

of being able to postpone paying compensation for minerals. But it contains all their rights, and is substituted for their rights at common law. That is established by a long line of cases.

In *Great Western Ry. Co.* v. *Bennett* (1) Lord Chelmsford's judgment states that it was the intention of the Legislature to create a new code, and the case clearly shews that where the surface is taken compulsorily, without the minerals, there is no right to support.

Pountney v. *Clayton* (2) is an important case, because it decides that a railway company purchasing the surface from a lessor, who, as against his lessee, was entitled to a right of support, did not acquire that right. *In re Lord Gerard and London & North Western Ry. Co.* (3) is a clear authority that the Act applies and excludes common law rights where a railway company has acquired compulsorily the surface and part of the minerals. So far as the right to support from adjacent minerals is concerned, it can make no difference whether the company have taken part of the minerals or the whole. In *Holliday* v. *Wakefield Corporation* (4) the corporation had taken for their waterworks land with all the minerals under it. The plaintiff claimed compensation under s. 6 of the Waterworks Clauses Act, not only for the mines taken, but for adjacent mines injuriously affected, because the reservoir would prevent his safely working them. But the House of Lords held that the claim was premature, because the plaintiff could get compensation under the mining clauses when he was ready to work. That is an authority that these clauses apply when the company takes all the minerals.

The judgment of A. L. Smith J. (as he then was) in *Consett Waterworks Co.* v. *Ritson* (5) shews that the view we have taken of *Pountney* v. *Clayton* (2) is the right one. In *Glasgow Corporation* v. *Farie* (6) the point to be decided was very different from this case, but Lord Macnaghten's observations on the extent of ss. 22 and 23 of the Act are valuable. He says: "They

(1) L. R. 2 H. L. 27, 37.
(2) 11 Q. B. D. 820.
(3) [1895] 1 Q. B. 459.
(4) [1891] A. C. 81.
(5) (1889) 22 Q. B. D. 318.
(6) (1888) 13 App. Cas. 657, 690.

FARWELL J. 1905 MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands. They also extend to mineral property within the prescribed distance, although the lands under which it lies do not belong to the undertakers or the company."

It will be said that in all these cases the land was taken compulsorily. As a matter of fact, in *Great Western Ry. Co.* v. *Bennett* (1) it does not appear whether it was so or not, but it cannot make any difference, seeing that the land here was taken under the powers of the corporation's special Acts, whether the compulsory powers were actually used. The introduction to this fasciculus of sections in the Act is "with respect to minerals." There is nothing to limit it to minerals under lands compulsorily taken, and to so limit it would need the introduction of limiting words into each section from 18 to 27. *Fletcher* v. *Great Western Ry. Co.* (2) shews that this fasciculus of sections applies to lands taken by agreement as well as to lands taken compulsorily.

The plaintiffs claim a right to support from the coal outside the forty yards limit fixed by the Act. The answer is that the code constituted by these clauses of the Waterworks Clauses Act applies to all coal at any distance. It would be absurd that the coalowner, if he were not compensated, should be able to work the coal within forty yards, but unable to work the coal beyond that limit, though he could never claim compensation for not working it. The plaintiffs cannot have the code rights within forty yards and their common law rights outside it. If they required support from a wider area they could prescribe a wider limit by their special Act. That argument is strengthened by the Public Health Amendment Act, 1883 (46 & 47 Vict. c. 37), which enables them to extend the limit at the time of giving notice if they desire it.

Moulton, K.C., in reply. Of the sections dealing with this subject s. 18 has no bearing on rights whatever: it only deals with the construction of conveyances; it does not give or take away any right to purchase minerals; it merely says if the undertakers want the minerals they must have them expressly

(1) L. R. 2 H. L. 27. (2) (1859) 4 H. & N. 242; (1860) 5 H. & N. 689.

conveyed. Sects. 19, 20, 21 are merely administrative as to plans, &c. Then s. 22 merely requires the mineowner to give the undertakers notice, and gives the undertakers power to give notice to treat. Sect. 23 provides that if the undertakers do not give notice to treat the mineowner shall have the rights he would have had if the Act had not been passed. That is the only clause which has anything to do with rights, and it excludes the Act. It is fatal to the defendants' claim that the Act gives them rights. Sects. 24 and 25 deal with compensation for severance, s. 26 with power of inspecting works, and s. 27 with the case of injury to the mines from the reservoir. The whole code, as it is called, is one of compensation, not of endowment. The sections gave power to postpone taking minerals and paying compensation for them. The whole principle is the undertakers only pay for what they take : all the cases go on that principle. *Great Western Ry. Co.* v. *Bennett* (1) only decided that if they postponed taking the minerals they postponed taking the right to support. *Great Western Ry. Co.* v. *Fletcher* (2) is to the same effect, and these two cases really exhaust the meaning of these clauses. *Pountney* v. *Clayton* (3) was an unusual case, but it only decided that a railway company purchasing, in the ordinary form, from the owner of the surface, who had a right to support, got neither the minerals nor the right to support from them, and therefore could not sell the right to support. *In re Lord Gerard and London & North Western Ry. Co.* (4) is to the same effect as *Bennett's Case.* (1) Lord Gerard could not claim compensation for severance until the time arose for giving notice under s. 22. *Holliday* v. *Wakefield Corporation* (5) was a case under s. 27, and only decided that a claim for damage under that section could not be made till the time for working the minerals came. *Glasgow Corporation* v. *Farie* (6) was merely a decision that a seam of clay was not included in "other minerals" in s. 18. *Consett Waterworks Co.* v. *Ritson* (7) was merely a question what passed under a compulsory purchase,

(1) L. R. 2 H. L. 27.
(2) 5 H. & N. 689.
(3) 11 Q. B. D. 820.
(4) [1895] 1 Q. B. 459.
(5) [1891] A. C. 81.
(6) 13 App. Cas. 657.
(7) 22 Q. B. D. 318.

FARWELL J.
1905
MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

and I submit it is in my favour. The Public Health Amendment Act, 1883, was passed with a wholly different intention. Sanitary authorities had power to make sewers under other people's land. The case of *In re Dudley Corporation and Earl Dudley's Trustees* (1) had decided that they thereby at once acquired a right to support, and must therefore at once pay compensation for damage sustained by the mineral-owner. The sanitary authorities were in a worse case than they would have been under the Waterworks Clauses Act. The Act of 1883 was merely passed to give them the benefit of the Waterworks Clauses Act. It provided that the sanitary authority should neither acquire nor be bound to pay for a right of support at the time of construction of the sewer, and might define the support they required when giving notice, and might then extend the limit beyond forty yards. The Act agrees exactly with our interpretation of the waterworks clauses that they simply provide for postponed compensation for rights taken away. We do not suggest that any rights were taken away without compensation, but no compensation can be due for rights not taken. The judgment of Lord Cairns in *Smith* v. *Great Western Ry. Co.* (2) shews clearly that every person interested in the mines is to be compensated for the loss of what he has a right to take. The compensation must be coterminous with the right. *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (3) is a decision under the Public Health Act to the same effect. The conveyance from Taylor to the corporation is not within s. 18, so it must be interpreted as an ordinary conveyance. It is impossible to say that it did not pass all the rights Taylor had. The defendants can have no right against the corporation which they had not against Taylor.

Neville, K.C., on new cases cited in reply.

Cur. adv. vult.

Dec. 12. FARWELL J. The plaintiffs claim to be owners in fee simple of certain lands in Lancashire, and as such seek an injunction to restrain the defendants from working the

(1) (1881) 8 Q. B. D. 86.
(2) (1877) 3 App. Cas. 165 179.
(3) (1868) L. R. 3 C. P. 612; (1869) 4 C. P. 192.

mines under adjacent land so as to let down the surface. Under their special Act (10 & 11 Vict. c. cciii.), which incorporated the Lands Clauses Act, 1845, and the Waterworks Clauses Act, 1847, the plaintiffs were empowered to acquire and construct waterworks for the supply of Manchester and other places with water, and accordingly, by conveyances dated January 13, 1875, they acquired under the powers of the Acts from Lord Stamford and had conveyed to them 246 acres, 3 roods, 31 poles, delineated on the plan on the deed, excepting and reserving to the grantor all mines and minerals with full liberty to work the same without making any compensation for injury to the surface; and by another conveyance, dated July 1, 1875, they acquired under the like powers from John Taylor and had conveyed to them 23 acres, 3 roods, 39½ poles, delineated on the plan thereon, together with all mines, minerals, delphs, and quarries therein. This latter property forms a sort of peninsula running up into, and on three sides nearly surrounded by, the Stamford land, as appears from the plan that has been put in evidence. In 1875 the plaintiffs obtained a further Act (38 & 39 Vict. c. clxi.) enabling them to extend their waterworks. I do not think it necessary to go further into details of the plaintiffs' title, as I hold that it is plain, on the face of the conveyances and Acts, that both the Taylor and Stamford land were acquired under statutory powers for the purpose of the waterworks, and it follows that the principles laid down by the House of Lords in *Elliot* v. *North Eastern Ry. Co.* (1) apply, namely, that the conveyances are to be read as if the Acts of Parliament were incorporated therein, and that, too, whether the lands were taken under compulsion or by agreement. When the undertakers have compulsory powers it can make no difference whether the landowner drives them to put those powers into actual execution or whether he yields without doing so; in either case he sells because he must. The case of *Elliot* v. *North Eastern Ry. Co.* (1) arose on the construction of a private Act with clauses differing materially from those that I have to consider, but the general principle is the same, and *Fletcher* v.

(1) (1863) 10 H. L. C. 333.

FARWELL J 1905 MANCHESTER CORPORATION. v. NEW MOSS COLLIERY, LIMITED.

Great Western Ry. Co. (1) is to the same effect. There the land was, as here, acquired by agreement, and not by putting into actual execution any compulsory powers, and Cockburn C.J., in the Exchequer Chamber, says: "The owners of the land in question had conveyed it to the defendants, a railway company, for the purposes of their railway. This was not a voluntary conveyance in the ordinary sense of that term, but a conveyance of the land according to the provisions of the Railways Clauses Consolidation Act"—I think he must mean the Lands Clauses Consolidation Act—"by which the owners must necessarily have parted with it." This is material, because the plaintiffs' case is pleaded and was opened as if they were simply owners in fee who had acquired land as a common law corporation and not under any statutory powers. I hold that this is not so, but that their rights fall to be determined as owners who have acquired under statutory powers.

The facts in the case are not really in dispute to any material extent. I find that the plaintiffs duly constructed their reservoirs, partly on Stamford land and partly on Taylor land, more than twenty years ago, part of the northern embankment being on Taylor land; and that the defendants have worked, and are continuing to work, under the Stamford land in such a way as to cause subsidence to the Taylor land and to render further subsidences inevitable, whether the working be continued or stopped at once, and that such subsidences would have occurred whether the embankment had been placed on the land or not. This last finding renders it unnecessary to refer further to the reservoirs on the point either of damages or of injunction: *Stroyan* v. *Knowles*. (2) There is a small discrepancy of expert opinion on the exact extent to which the area of danger of subsidence extends, but it is unnecessary for me to decide between the conflicting experts, because it is common ground that this area extends considerably beyond forty yards from the outside of the Taylor land. The defendants have given notice of their intention to work up to the limits of their property, and the plaintiffs have declined to pay compensation under the Act, and insist that they have the ordinary rights of a common law owner

(1) 4 H. & N. 242; 5 H. & N. 689, 697. (2) 6 H. & N. 459.

to lateral support; the defendants contend that the rights of the parties depend on the Waterworks Clauses Act, and that under that Act the plaintiffs have no such right; the plaintiffs retort that those Acts do not expropriate owners without compensation, but proceed on the basis that nothing is taken away without compensation, and that nothing has been done or paid to deprive them of the ordinary owners' right to lateral support, and that if they do not choose to compensate the defendants, the latter can only proceed to exercise such rights as they would have had if the Waterworks Clauses Act had not passed.

Now the rights of surface and mineral owners at common law are well settled. Every landowner has, as an incident of his property in land, a right to its lateral support by the adjacent land to an extent sufficient to support it in its natural state. Where the surface and the minerals have been severed, whether by grant of surface reserving minerals or by grant of minerals reserving surface, the surface owner has a right to support both lateral and vertical unless a power of working the minerals so as to let down the surface is granted or reserved, and where there is nothing to shew how or when the surface and minerals were severed, the same right to support exists. The authorities cited in argument undoubtedly establish that in the case of railway and waterworks undertakings the common law in this respect has been displaced by a statutory code. As Lord Esher says in *Lord Gerard's Case* (1): "I am of opinion that, wherever the company seek to take compulsorily from a landowner part of his land, leaving a mine, the case is governed by the group of sections in the Railways Clauses Consolidation Act commencing with s. 77. It appears to me that that group of sections is the law by which in such a case the rights and obligations of both parties are to be determined, to the exclusion of any common law right that might otherwise arise from the relation between the parties. The rights which arise from that relation are statutory, and all questions, both as regards compensation and other matters, are to be governed by the Act of Parliament."

This is fully borne out by the cases in the House of Lords of *Great Western Ry. Co.* v. *Bennett* (2) and *Holliday* v. *Wakefield*

(1) [1895] 1 Q. B. 464. (2) L. R. 2 H. L. 27.

FARWELL J. 1905 MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

Corporation. (1) Lord Esher confines his observations to the case before him, but for the reasons already given I am of opinion that the code applies, whether the land is taken compulsorily or not, in all cases where the undertakers acquire lands under statutory powers which incorporate the Lands Clauses Act and the Railways Clauses Act or the Waterworks Clauses Act, as the case may be. Further, I am of opinion that this statutory code cannot be dealt with piecemeal by taking s. 18 of the Waterworks Clauses Act alone and looking no further into the Act when it is shewn that the undertakers have acquired the mines as well as the surface, but that all the sections relating to mines in the fasciculus of clauses (ss. 18 to 27 inclusive) are to be read together as part of one scheme of legislation, and, "if any defect or obscurity be found in any one, recourse is to be had to the whole series": see Lord Macnaghten's judgment in *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (2), citing *Smith* v. *Great Western Ry. Co.* (3) Except that s. 27 in the Waterworks Clauses Act has no equivalent in the Railways Clauses Act, I agree with the statement of the late A. L. Smith J. in *Consett Waterworks Co.* v. *Ritson* (4), that there is no material distinction between the Railways Clauses Act, 1845, and the Waterworks Clauses Act, 1847, in this respect; the sole difference is that in the former Act it is provided that, if no compensation is paid, it shall be lawful for the mineowner to work the mines, and in the latter there are added these words, "as if this Act and the special Act had not been passed." In my opinion these words are necessarily implied in the Railways Clauses Act, and their insertion in the Waterworks Clauses Act adds nothing to the clause, and the decided cases that have been cited are equally applicable whether they relate to railways or to waterworks.

In considering the powers and duties to be given to and imposed on undertakers exercising the compulsory powers of the Lands Clauses Act, the Legislature foresaw that, in the case of railway and waterworks undertakings, peculiar conditions would exist with respect to mineral rights. It would be obviously unjust to

(1) [1891] A. C. 81.
(2) [1903] A. C. 426, 430.
(3) 3 App. Cas. 165.
(4) 22 Q. B. D. 318, 329.

deprive the mineral-owners of their property without compensation, but there was great difficulty in most cases in assessing any immediate value that would be fair, and moreover in mineral districts the amount of compensation, if mines had to be purchased out and out in the first instance, might be so large as to render the construction of the undertaking financially impossible. It therefore appeared good to them to alter the common law by which a purchaser buying land acquires with it such rights as are necessary for its use for the purpose for which it is bought and which the vendor can convey, and (in the case of waterworks) the law by which undertakers, who are authorized to execute works, are under no liability for any loss arising from the proper construction and use of those works. By the former I mean the law as enunciated in *Caledonian Ry. Co.* v. *Sprot* (1), and *Elliot* v. *North Eastern Ry. Co.* (2), and by the latter the law as enunciated in *Rylands* v. *Fletcher*. (3) In order to get over this difficulty the Legislature adopted the principle of deferred compensation; it relieved the undertakers from the necessity of immediate purchase, and it preserved to the mineral-owner his right to be fully compensated when the time arrived at which it became practically possible for him to work his mines, or, in default of compensation, his right to work notwithstanding that he might thereby let down the surface. As Lord Macnaghten says in *Glasgow Corporation* v. *Farie* (4): "Where lands containing mines are taken by a railway company it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he would be selling a long narrow strip of minerals, which might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser, it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct waterworks require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. And in many cases they may be worked without interfering with the beneficial enjoyment of the surface."

(1) (1856) 2 Macq. 449.
(2) 10 H. L. C. 333.
(3) (1868) L. R. 3 H. L. 330.
(4) 13 App. Cas. 657, 696.

FARWELL J.
1905
MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

In the case of waterworks, if the mineowner works in default of receiving compensation the undertakers may be liable for injury done to his mines by flooding under the doctrine of *Rylands* v. *Fletcher*. (1)

This is carried out by the fasciculus of clauses in the Waterworks Clauses Act, 1847, ss. 18 to 27. Sect. 18 provides that the undertakers shall not be entitled to any mines or minerals under any land purchased by them except only such parts as are carried away in constructing their works unless they expressly purchase them, and all such mines are excepted out of the conveyance of such lands unless expressly named and conveyed. I cannot regard the section as a mere conveyancing section, inserted solely for the purpose of altering the ordinary construction of deeds in the case of railway and waterworks undertakings, and therefore of no application in cases where the mines are bought and conveyed; either by itself or in conjunction with the following clauses, when the mines are not purchased, it has the effect of depriving the undertakers of all right to support from the excepted mines—a right that would otherwise be implied, as the sale is for the purpose of the undertaking: see Brett M.R.'s judgment in *Pountney* v. *Clayton* (2)—as soon as the mineowner is in a position to give notice of intention to work his mines; and this appears to me to be material in considering the effect of the exception in the section of minerals expressly purchased. It is contended that it has the effect of placing the undertakers, who have purchased the mines, outside the Act altogether, and in the position of an ordinary owner in fee. But inasmuch as the Courts have held, on a consideration of all the sections (18 to 27), that the conveyance of land, excepting the mines, does not grant any indefeasible right of support, it is necessary to consider whether there is anything in the same sections that will affect the right thus claimed under the exception in s. 18, where the conveyance under the statute has been of the mines as well as of the surface. Sect. 22 provides that except where otherwise provided for by agreement between the undertakers and other parties, if the owners of mines under the undertakers' works or within the area prescribed by their private

(1) L. R. 3 H. L. 330. (2) 11 Q. B. D. 820, 834.

Act or, if none, within forty yards therefrom (which I will call the statutory area) be desirous of working, such owners shall give notice of their intention to work thirty days before commencing to work, and if the undertakers make compensation shall not work; but if they fail so to do the mineowners may work as if the Act and the special Act had not been passed. This clause obviously applies to all mines within the statutory area, whether they belong to the owner of the surface taken by the undertakers or to other persons. The principle of the Act is that no person shall be deprived of his mines without compensation; if the owner of adjacent mines is not the same person as the owner of the surface taken, he is within s. 22, and cannot work without giving notice; he is therefore deprived of a valuable right, as Rigby L.J. says in *Lord Gerard's Case* (1); if he gives notice he is entitled to compensation or to work with the benefit of s. 27. This is clear if the surface owner has sold surface only, and how can any act of his alter the rights of the adjacent owner? Those rights are affected in either case: it would be manifestly unfair to make his right to compensation depend on the acts of a third person. If, as Mr. Moulton argues, the principle of the Act is compensation, not expropriation, why is the owner of the adjacent mines to be deprived of his rights under ss. 22, 23, and 27 by the payment of compensation to another person? It is true that the owner in fee at common law who sells the fee sells also the rights that he has to lateral support; but the answer must be that in this case s. 18 does not put the undertakers in the position of the ordinary owner in fee, but in the position of owner in fee according to a statute, which gives them such rights only as they can possess and enjoy consistently with the rights given to others by the same statute. This leaves untouched the case where the owner of the surface who sells the mines as well is also owner of the adjacent mines. It may be (I express no opinion) that he grants the right to subjacent support, if he gets compensation which covers it; but this does not apply to the case of the adjacent mineowner who has received no compensation and has done nothing to displace or defeat his statutory rights. If this were

(1) [1895] 1 Q. B. 470.

FARWELL J. 1905 MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

not so, the waterworks company might purchase a strip of land a few yards wide and long with the mines below, and, by building the wall of their reservoir upon it, prevent large areas of coal from being worked without paying any compensation at all and without being under the liability imposed by s. 27. The evidence in this case shews that the area of danger in the case of deep mines with the seam on the dip is very large, and that the value of the minerals in question in this case is nearly a million sterling. Further, the acquisition of the mines by purchase under s. 18 is entirely at the option of the company, and they are not likely to buy except in cases where the existence of workable mines is extremely unlikely. It is no part of their business to work mines, nor could such strips as they would buy be worked profitably. If they buy, they buy for support, and they can do this more advantageously under s. 22, not only because they can defer payment, but also because they do not under that section buy and pay for the mines, but have only to compensate the mineowner for what the mineowner would have made out of it during the time it would have taken him to work it: see *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (1)

Although there is no express authority on the point, this is the principle on which the Exchequer Chamber appears to me to have acted in *Metropolitan Board of Works* v. *Metropolitan Ry. Co.* (2), where they held that the Board of Works had acquired no right to lateral support for one of their sewers, and this is the distinction between that case and the case of *In re Dudley Corporation and Earl Dudley's Trustees* (3), where the right to direct support by subjacent mines was held to have been acquired. I agree with Mr. Moulton's contention that the Lands Clauses Act and the Railways Clauses Act and the Waterworks Clauses Act are based on the principle that expropriation and compensation go hand in hand, but I apply it against the plaintiffs in favour of the owner of adjacent minerals, who is not to be expropriated without compensation. There is no question of expropriating the plaintiffs, they are the

(1) [1903] A. C. 426. (2) L. R. 4 C. P. 192.
(3) 8 Q. B. D. 86.

persons with statutory power to expropriate others; and the real question is, What extent of estate and interest on the true construction of the Act have they succeeded in appropriating to themselves? I hold, therefore, that the defendants are entitled to work within the statutory area, whether they let down the plaintiffs' reservoirs or not.

The next question is, as to the rights of the parties entitled outside the statutory area, in this case forty yards, as the plaintiffs' private Acts give no other limit; for I find on the evidence that workings without, as well as within, the area have caused subsidences in parts of the plaintiffs' embankment on the Taylor land, although it is not possible to distinguish the different effects produced thereby. Now, the extent of the statutory area is left to the discretion of the undertakers, just as the extent of the land to which their compulsory powers and the limits of deviation therefrom are left to them, subject, of course, to the approval of the Committee of the House. The scheme of all such Acts is that the undertakers state accurately the extent of the property required to be taken by them and obtain from the Legislature powers over the same in exchange for compensation; the Courts never presume that the Legislature has authorized A. to take B.'s property without compensation; the Legislature can, of course, do so, if it thinks right; but, if it does, its intention must be expressed in clear and plain terms. The obvious intention of the Waterworks Clauses Act is that the undertakers should state the area from which they require support and should be authorized to acquire such support with the special privilege of deferring payment of compensation. Their contention is that they are entitled to support beyond that area so chosen by themselves without paying any compensation—that is, that they can give themselves rights without payment by neglecting to secure a proper area of protection either intentionally or from lack of foresight. I am of opinion that I cannot construe the conveyance according to the statute under s. 18 as giving them any such rights; the undertakers have been given the powers and privileges in the statute in exchange for all other rights in respect of support, whether lateral or vertical; if they cannot claim the benefit of s. 22 to an extent sufficient to protect their works, they

FARWELL J. 1905 MANCHESTER CORPORATION v. NEW MOSS COLLIERY LIMITED.

have only themselves to thank, because they failed to extend the statutory area sufficiently. I cannot construe the Acts so as to enable them to increase their rights by their own defaults, and there is all the more difficulty in the plaintiffs' way because this right claimed by them is one to which it would be very difficult to give practical effect by way either of injunction or damages. A claim to lateral support, not from the adjacent land which can be rightfully worked out, but from land beyond the worked-out adjacent land, is certainly difficult to enforce in practice: see *Birmingham Corporation* v. *Allen*. (1)

Further, I think that my opinion on both points follows from and is not an undue extension of the decision in *Pountney* v. *Clayton*. (2) In that case the minerals under the land taken by the railway company were in lease to a tenant, and the Court of Appeal assumed that the tenant was bound as between himself and his lessor so to work the mines as not to let down the surface. The lessor conveyed the land to the company subject to the lease, and the company took advantage of the Railways Clauses Act and did not purchase the lessee's interest. It was argued that, as the lessor had conveyed that surface to the company, he had thereby conveyed all the rights in respect of and for the benefit of the surface which he had as against the lessee; but the Court rejected this contention, and held that the company had only such rights as the mineral sections in the Railways Clauses Act had given them, and that the lessee could work so as to let down the surface as against the railway company and all persons claiming through them, although the lessor had not as between himself and his lessee parted with his rights to support. Mr. Moulton urged that the case merely decided that the plaintiff had not proved his title, but the gist of the decision is the reason why he failed to prove it. I venture to think that I am following the principle of that decision in holding, as I do, that undertakers cannot claim under conveyances made in pursuance of Acts incorporating the Railways Clauses and Waterworks Clauses Acts—whether such conveyances be of surface alone or of surface and minerals—any right to support from land belonging to any person to whom they

(1) (1877) 6 Ch. D. 284. (2) 11 Q. B. D. 820, 832.

have not paid or are not ready and willing to pay compensation under the Act.

FARWELL J.

1905

MANCHESTER CORPORATION v. NEW MOSS COLLIERY, LIMITED.

Reference has been made to the Public Health Amendment Act, 1883, but I do not think that it has any bearing on the case before me, except that s. 3, sub-s. 2, enables local authorities, such as the plaintiffs, to alter and extend the statutory area. This section obviates any difficulty that may arise from a mistake in the original estimate of the area of danger, and enables local authorities to protect themselves in case of danger on the usual and proper terms of paying compensation. The result is that the action fails, and is dismissed with costs.

Solicitors: *Austin & Austin, agents for William Henry Talbot, Manchester; Bower, Cotton & Bower, agents for H. G. Hall, Ashton-under-Lyne.*

J. R. B.

THOMPSON *v.* HAMMERSMITH CORPORATION.

BUCKLEY J.

[1905 T. 1656.]

1905

Dec. 14, 19.

London—Metropolis Management—Streets—Widening—Power to take Part of House—Michael Angelo Taylor's Act, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

Plaintiffs, knowing of the scheme of a municipal corporation for widening a street which would affect premises about to be taken by them, took a lease of a house and became liable under the covenants therein to make substantial alterations in the premises (with a view to the same being used by plaintiffs as an outfitters' and tailors' shop).

The premises at the date of the lease consisted of an old house in the middle of the front of which stood a large chimney-stack connected with several fireplaces, and the building had three floors. The alterations to be made by plaintiffs involved the destruction of the stack (so as to give a greater space for the new shop on the ground floor) and the fireplaces, the conversion of the three floors into two floors, raising the ceiling of the ground floor, and throwing the remains of the house into a first floor room running from back to front. The corporation, for the purpose of widening the adjoining street, gave notice to treat (purporting to be under s. 82 of Michael Angelo Taylor's Act) for part of the house, consisting of frontage of from 5 ft. 2 in. to 7 ft. 2 in. in depth, the result of taking which would have been to destroy the stack and fireplaces, to render practically useless rooms on the first and second floors, to absorb the space acquired by removing the stack into the street, and (unless the adjoining houses were both thrown back to a like extent, a change

BUCKLEY J.

1905

THOMPSON v. HAMMERSMITH CORPORATION.

which had not yet been effected) to throw the frontage of the plaintiffs' building back from the main line of frontage:—

Held, that the proposed acquisition, if allowed, would result in destroying the house as a house, that their knowledge of the scheme did not preclude the plaintiffs from relief, and that an injunction must be granted restraining the corporation from proceeding under the notice to treat.

Observations on the judgment of Kindersley V.-C. in *Thomas* v. *Daw*, (1866) L. R. 2 Ch. 2, n.

THE plaintiffs, A. W. Thompson and A. R. S. Jackson, were tailors and outfitters, carrying on business in partnership as Thompson & Jackson, and on May 15, 1905, they took a lease of No. 98, King Street, Hammersmith, for forty years from March, 1905, with a view to carrying on business there.

The demised premises were what were or had been two old small houses consisting of three floors, a ground floor, first floor, and some attics. The wall at the back (which the surveyors called as witnesses in the case called "the back front") was, at the level of the ceiling of the ground floor, carried upon girders so that the ground floor ran beyond it, but the first floor and attics did not run beyond it. The building was warmed by means of fireplaces set in an ancient chimney-stack which stood midway between the two houses. Under the terms of the lease the plaintiffs had to make considerable alterations in the premises, involving the destruction of the chimney-stack (for the purpose of making greater space for the new shop), the conversion of the three floors into two floors, raising the ceiling of the ground floor to some extent, and throwing the remains of the house into a first floor room extending from the front wall of the house in King Street to the back front.

His Lordship in his judgment found that when the plaintiffs acquired the lease they had seen a tracing shewing certain works proposed to be carried out by the corporation of Hammersmith with a view to widening High Street, and knew that such a widening as was in question with regard to 98, High Street, and is mentioned below, was in contemplation.

On June 16, 1905, the plaintiffs received from the Hammersmith Corporation a notice to treat in respect of a part of the frontage of the shop, the strip proposed to be taken varying in depth from 5 ft. 2 in. at the east end to 7 ft. 2 in. at the west end.

The notice to treat purported to be given under the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.) commonly called "Michael Angelo Taylor's Act."

The effect of taking the strip of frontage would have been as follows: The chimney-stack and the fireplaces connected with it would have been destroyed; and what were the first and second floors of the old premises would also have been destroyed or materially affected. Mr. Chatfield Clarke, one of the witnesses for the defendant corporation, in his evidence, was compelled to admit that the rooms referred to would be nothing like so good as they were before, and although he said that they would be fair usable rooms, his Lordship found that the depth from back to front would be so affected by the taking of the strip by the corporation that the rooms would not be the same as theretofore and would be practically useless.

At either side of No. 98, High Street, there were other premises, known as No. 96, High Street, and No. 100, High Street, and unless the frontages of these premises were also thrown back, the plaintiffs' premises would, by the proposed taking of a strip, be left in a sort of well thrown back from the main frontage to the street.

At the time of the trial the corporation had sanctioned the purchase of a portion of No. 96, but as regarded No. 100 not even a notice to treat had then been given.

The plaintiffs commenced this action against the corporation for an injunction to restrain it and its officers and servants from proceeding under the notice to treat to take such part of the house, lands, and hereditaments of the plaintiffs as in the said notice mentioned.

Buckmaster, *K.C.*, and *Waggett*, for the plaintiffs. The question is whether the corporation can take the strip only of our property referred to in the notice to treat. We contend that they must take the whole of the property.

The case turns on the meaning of s. 82 of Michael Angelo Taylor's Act. (1) Local authorities cannot, for the purpose of widening streets, take part of a house if the result will be to leave

(1) See Chitty's Statutes, 5th ed. title "Metropolis," p. 34.

BUCKLEY J. 1905 THOMPSON v. HAMMERSMITH CORPORATION.

a house of a substantially different character. It is not contended that under no circumstances can part of a house be taken—for instance, a porch or a cellar extending into the area of the proposed widening might be taken. But the plaintiffs could not, if the proposed strip were taken, use what was left for the purposes for which they require the property and to carry out which they have taken a lease; and it is no answer for the corporation to say that we can utilize land or outbuildings in the rear. The view which the plaintiffs take is supported by *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1) and *Gibbon* v. *Paddington Vestry.* (2) The result of these cases is that part of a house cannot be taken unless thereby the identity of the house as a house is unaffected.

It is immaterial that the plaintiffs knew—if they did know—when the lease was taken that the proposed scheme for widening the street would, if carried out, affect them.

[They also referred to *Pescod* v. *Westminster Corporation.* (3)]

Astbury, K.C., Courthope-Munroe, and *Langston,* for the corporation. We say, first, that the plaintiffs are so pulling the place about that it ought to be regarded not as a house but as vacant land, in which case we could clearly take a part. Secondly, we submit that if they do what we suggest they will have a lighter and better shop. Thirdly, we say that the plaintiffs cannot succeed because before they took their lease they knew that the widening was to take place.

We have already purchased strips for the purpose of widening the street on the other—the south—side of King Street and have there effected the widening. We have also purchased strips on this side—the north side—of the street. The purchase of part of No. 96—next door to the plaintiffs' property on one side—was sanctioned last night. It is clear that part of a house can be taken, but the right to take is to some extent limited—and it is in each case a question of fact whether taking a part will cause such an alteration as to make the partial taking unfair.

The Act contemplates that part of a piece of land—say a field—

(1) [1894] 2 Q. B. 742. (2) [1900] 2 Ch. 794.
(3) [1905] 2 Ch. 475.

may be taken. Again, if a house had been burnt out, and had to be reconstructed, the property might be treated as no longer a house but as vacant land. In *Thomas* v. *Daw* (1) Kindersley, V.-C., says: "At the time of the notice, it was true, No. 50 was not pulled down, but it was intended to be pulled down, and must for the purposes of this motion be considered as a house actually pulled down."

[BUCKLEY J. The decision on appeal in *Thomas* v. *Daw* (2) seems to have been based on a different ground.]

But Lord Chelmsford L.C. said that s. 80 appeared to give power to take part only of a house. The alterations proposed to be made by the plaintiffs themselves are so extensive that they are tantamount to pulling the building down and rebuilding it. What we propose to do will not make a substantial further alteration. Therefore, whether what we propose to do is making a slight alteration in an existing house—that is to say, a house existing in such a state as it would be in after the plaintiffs had themselves altered it—or the premises are regarded as a burnt-out house, or as a house intended to be pulled down and rebuilt—an injunction ought not to be granted to stop us from taking a part only.

[They also referred to *Gard* v. *London Commissioners of Sewers* (3); *Stroud* v. *Wandsworth District Board of Works* (4); and *Metropolitan District Ry. Co.* v. *Fulham Vestry.* (5)]

No reply was called for.

BUCKLEY J. The question I have to decide is whether the defendants are entitled to proceed under a notice to treat dated June 16, 1905, with respect to a house known as No. 98, King Street, Hammersmith. It is a notice to treat under which the defendants desire to acquire a strip off the front of the house varying in depth from 5 ft. 2 in. at the eastern end to 7 ft. 2 in. at the western end.

First, as to the law. Sect. 80 of Michael Angelo Taylor's Act does, but s. 82 does not, add to the general words "houses, walls,

(1) L. R. 2 Ch. 3, n.
(2) Ibid. 1.
(3) (1885) 28 Ch. D. 486.
(4) [1894] 2 Q. B. 1.
(5) [1895] 2 Q. B. 443.

BUCKLEY J. 1905 THOMPSON v. HAMMERSMITH CORPORATION.

buildings, lands, tenements, and hereditaments," the words "or any part thereof." In *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1), however, it was decided by a Divisional Court of the Queen's Bench Division that the words "or any part thereof" are by implication carried on into the words "such houses, buildings, lands," &c., in s. 82, with the result that under that Act compulsory purchase may be made of part without taking the whole, thus differing from a purchase to which s. 92 of the Lands Clauses Act, 1845, applies. As matter of decision, that case ends there. The parties in that case were willing that the motion should be treated as the trial of the action, but the Court declined so to deal with it, and refused by an interlocutory order to restrain the vestry from proceeding upon their notice to treat, and this upon the ground that the Court could not until the trial of the action determine the question whether that which the vestry proposed to take was or was not a part of the premises within the Act of Parliament. As matter of dictum, however, the Court there did go on to say what would satisfy the words "or any part thereof," and laid down that a house is prima facie a unit incapable of division, and that the vestry could take part of a house only when that part was separable from the house so that it could be removed without destroying the house as a house. I need scarcely say that I should have had no hesitation in following that ruling, although it was but a dictum; but the matter does not stop there. In *Gibbon* v. *Paddington Vestry* (2), this question was the subject of decision by Stirling J. at the trial of the action in that case. Stirling J. held that the owner could compel the vestry to take the whole of the house when the part which they claimed the right to take was not, within *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1), a part separable from the house so that it could be removed without destroying the house as a house.

As the next point, let me suppose that the house in question is one to which the owner is, at the date of the notice to treat, making or proposing to make, or is under covenant to make, alterations. The defendants argue upon some words of

(1) [1894] 2 Q. B. 742. (2) [1900] 2 Ch. 794.

Kindersley V.-C., in *Thomas* v. *Daw* (1), that in such a state of facts the matter is to be treated as if that which the owner was contemplating doing had been actually done. The Vice-Chancellor's words are these: "At the time of the notice, it was true, No. 50 was not pulled down, but it was intended to be pulled down, and must for the purposes of this motion be considered as a house actually pulled down." The Vice-Chancellor's decision was appealed from, and upon appeal, as I understand the judgment of Lord Chelmsford L.C., he did not agree with that sentence of the Vice-Chancellor. He refers to it at p. 6 of the report in the *Law Reports*, and after saying that he is not disposed to agree exactly with the reasons which appear to have governed the Vice-Chancellor's decision he goes on to affirm his decision, not upon the grounds which the Vice-Chancellor had assigned, but upon the ground, as appears at p. 8, that the Commissioners had not satisfied the essential preliminary as to No. 50, in that their adjudication which is to be found at p. 5 was not that the site of No. 50 was necessary but only that part of the site of No. 50 was necessary for the purposes of the Act.

Apart from *Thomas* v. *Daw* (2), and regarding the matter upon principle, it seems to me that the rights of the defendants must be determined, not upon that which the owner had in contemplation when the notice to treat was served, but upon the rights which the owner had as owner of a house which at the date of the notice to treat was of a particular kind and which the owner might or might not alter as he was minded. By the word "owner" I mean all the owners at the time in question; that is to say, for the purposes of the present case, not the lessees only but the lessor also. The defendants' rights are not in my opinion enlarged by reason of any intended voluntary alterations which the plaintiffs were minded to make or were under covenant to make. At the most the contention would be relevant only if the alterations in question would, if carried into effect, have resulted in a new house, of which the part which the defendants desired to take was not an essential part.

The fact that the plaintiffs are making, or are under covenant to make, certain alterations, does not authorize the defendants

(1) L. R. 2 Ch. 1, 3, n. (2) L. R. 2 Ch. 1.

BUCKLEY J. 1905 THOMPSON v. HAMMERSMITH CORPORATION.

to say: "You must make further alterations which will cost you no more, and will answer your purpose just as well, and which when made will render the part which we want no longer an essential part of the house." The plaintiffs are entitled to say that the matter is to be dealt with as regards the house as it in fact is at the date of the notice to treat, or at the most as it will be when altered in the way in which they are going to alter it.

This being the law which in my opinion I have to apply, I must state the relevant facts. The plaintiffs when they took the lease had seen a tracing which has been produced and knew that such a widening as is here in question was in contemplation as regards the house. Their lessors, however, could and did give them a leasehold interest in such a house as was then there on the site. The defendants' rights are no larger by reason of the fact that the plaintiffs took a lease of a house as against which they knew that the defendants were minded to exercise such rights as Michael Angelo Taylor's Act gave them, and of which the defendants were asserting—if that were the fact—that they had a right to take this strip. The question is, What rights does the Act give them? Have they or have they not a right to take the strip? I have discussed the nature of the rights given by the Act. The question I have now to consider is whether the part which the defendants propose to take is separable from the house so that it can be removed without destroying the house as a house.

Now, in the first place, the building as it stood when the notice to treat was given was provided with and warmed by fireplaces set in a large chimney-stack—which was very ancient, I should think, having regard to the position in which it stands—and which was midway between the two small houses which made up the larger house as the plaintiffs intend to occupy it. By taking the strip in question the defendants would have destroyed the whole of the chimney-stack and also all the fireplaces that warmed rooms in some parts at any rate of this house. Of course, it is obvious that that is taking such a part of the house as not to leave it such a house as it was before; it could not be enjoyed as such a house as it previously had been. But it is said, and said truly, that the plaintiffs were going to destroy the chimney-stack

themselves in the alterations they were about to make. But mark—they were going to destroy the chimney-stack for the purpose of enlarging by the space that would be left bare by its removal the area of their one large shop. Whatever view may be taken of *Thomas* v. *Daw* (1), the defendants cannot, I think, say that for the purposes of determining their rights I must treat the chimney-stack as a thing already destroyed when they propose to remove it, not for the purpose for which the plaintiffs intend to remove it, namely, to increase the space available for their new shop, but for another purpose altogether, namely, that of throwing into the street the space formerly occupied by the chimney-stack.

What I have said is enough to dispose of the case if I am right in saying that the fact that the plaintiffs were themselves going to remove it is immaterial—for the removal by the defendants would destroy all the chimneys and fireplaces.

Secondly, it is necessary here shortly to describe the premises. At the time of the lease they were old premises, consisting of three floors—a ground floor, first floor, and some attics. The wall which is called the back front of the house (I should call it the back wall of the house, but the surveyors call it the back front), was, at the level of the ceiling of the ground floor, carried upon girders so that the ground floor ran beyond it. The first floor and attics did not run beyond it. The alterations which the plaintiffs proposed would have converted the three floors into two, would have raised the ceiling of the ground floor to some extent and thrown the remains of the house into a first floor room and that would have been a room extending from the front wall of the house in King Street to this back front. If the defendants take this strip, they will destroy the value of the rooms which occupy at present the first and second floors and as altered will occupy the first floor of the house. Mr. Chatfield Clarke, who was called for the defendants, was compelled to say that certainly those rooms as rooms would be nothing like as good as they were before. The best he could say was that they would be fair usable rooms. The depth of the room from back to front would be so affected by taking this strip as that the room

(1) L. R. 2 Ch. 1.

BUCKLEY J. 1905 THOMPSON v. HAMMERSMITH CORPORATION.

would become practically useless, not at all the same as before. However, the defendants say, "Well, but you can build a new back front seven feet further back, and the front wall will be seven feet further back, and then you will have the same space that you had before." To my mind that is no answer at all. I do not think that the defendants are entitled to say: "We will take a part of your house and then we will shew you how to build a new house—for that is substantially what this is—which will be just as good as the old one."

Thirdly, consider what will be the effect as regards the ground floor. As I have said, the back front there does not extend down to the ground floor, so that you may get additional space there, I agree; and the plot is of such a considerable depth from north to south that you may to some extent make as good a shop on the ground floor. But what the defendants propose to do would destroy the ground floor front shop in this sense, that the front part, the large extra space which would be gained by this intended removal of the chimney stack, would be absorbed into the street, and the shop itself would be thrown further back. Now that is a matter which, as regards the particular business which the plaintiffs desire to carry on is one of moment, for the principal part of the shop, the ground floor, is to be used for the purpose of a show-case, where they want to put up tailors' dummies and shew their goods and so on in front, and that being so, the ground floor shop, it seems to me, would be largely affected.

Fourthly, the effect of acquiring the strip will be to throw the front of No. 98 back to the extent I have said, of 5 ft. 2 in. at one end, and of 7 ft. 2 in. at the other end, and unless No. 96, on the one side, and No. 100, on the other, are thrown back to a like extent, nobody disputes that the value of the plaintiffs' premises, No. 98, as a shop will be largely affected. They would be left in a sort of well set back from the main frontage to the street. The defendants as to that say, "Yes; that would be so, but we are going to set back No. 96 and No. 100 also." I dare say they intend to do so, but the position of affairs is this: as regards No. 96, the house on the one side, they finally sanctioned the purchase of what they

want there on the day when this cause is in the paper for trial; and as regards the house on the other side, No. 100, they have not, up to the present moment, even given a notice to treat. Consider in what position the plaintiffs will be left as regards those other two houses. I do not for a moment suggest that the defendants do not bona fide intend to do what I have pointed out. I have no doubt it is part of their scheme. But, suppose they did not do it, what power would the plaintiffs have to compel them to do it?

For all these reasons, I arrive at the conclusion that the strip which the defendants propose to take is such as that the part is not separable from the house, so that it could be removed without destroying the house as a house. I think that the case is governed by the decision in the Divisional Court in *Gordon* v. *Vestry of St. Mary Abbotts, Kensington* (1), and the decision of Stirling J. in *Gibbon* v. *Paddington Vestry.* (2) It seems to me, therefore, that the plaintiffs are entitled to the injunction they ask. In granting that injunction I do not in any way say what the defendants may be entitled to substitute for what they have been proposing to do, I only say that this notice to treat is one they cannot carry into effect. I therefore grant an injunction to restrain the defendants, their officers and servants, from proceeding under their notice to treat to take such part of the house, lands, and hereditaments of the plaintiffs, No. 98, King Street, Hammersmith, as is in the said notice mentioned, and order the defendants to pay the costs.

Solicitors for plaintiffs: *Guscotte, Wadham & Co.*
Solicitors for corporation: *Watson, Sons & Room.*

(1) [1894] 2 Q. B. 742. (2) [1900] 2 Ch. 794.

F. E.

JOYCE J. 1905 *Nov.* 7, 8; *Dec.* 6.

ATTORNEY-GENERAL *v.* NORTH EASTERN RAILWAY COMPANY.

[1905 A. 1288.]

Company — Powers — Ultra Vires — Railway Company — Dock Company — Amalgamation — Water obtained from Land acquired for Purposes of Railway — Supply to Dock — North Eastern Railway (Hull Docks) Act, 1893 (56 & 57 *Vict. c. cxcviii.*), *ss.* 4, 7 (*i.*) (*iv.*).

The undertaking of a dock company was amalgamated with that of a railway company by a special Act of Parliament, which provided that the undertakings so amalgamated should constitute one undertaking and be the undertaking of the railway company. Previous to the amalgamation the dock company had been supplied with water by the corporation of K. After the amalgamation the railway company ceased to take the water of the corporation and supplied the dock with water which they obtained from wells or springs upon land originally acquired by them for the purposes of their railway. In an action against the company by the Attorney-General at the relation of the corporation:—

Held, that in the absence of any prohibition in the amalgamating Act, there was nothing illegal or ultra vires in what the defendants were doing.

THIS was an action by the Attorney-General, at the relation of the corporation of Kingston-upon-Hull, against the North Eastern Railway Company as defendants, asking for a declaration that it was ultra vires for the defendant company to supply a certain dock belonging to them at Kingston-upon-Hull with water obtained from land forming a part of their railway undertaking, for any purpose connected with the dock, or to sell or supply water so obtained to any of their tenants occupying premises within the dock, or to any ship using the dock, or otherwise to carry on the business of a water company. The corporation were the owners of a waterworks undertaking under an Act of 1897, and the limits within which they were authorized to supply water were the city and county of Kingston-upon-Hull. Parts of the defendants' railway and also their dock were within the city and county. Previous to 1893 the dock in question formed part of the undertaking of the Hull Docks Company, which was incorporated by

special Act for the purpose of constructing and working the dock.

By the North Eastern Railway (Hull Docks) Act, 1893, it was provided (s. 4) that the railway and the dock should be amalgamated and that thenceforward the two undertakings should constitute one undertaking, which should be the undertaking of the company, i.e., the defendants. By s. 7 (i.) it was provided that, notwithstanding the amalgamation, "none of the provisions of the Acts relating to the dock company which, if the amalgamation had not taken place, would apply exclusively to the undertaking of the dock company or to the dock company in respect thereof shall apply to any portion of the undertaking of the company other than the dock undertaking or to the company in respect thereof"; and by s. 7 (iv.) it was provided that "none of the provisions of the Acts relating to the railway company, which, if the amalgamation had not taken place would apply exclusively to the railway and the traffic thereon, shall apply to the dock undertaking or to the company in respect thereof."

Since the year 1893 the dock had been vested in and worked by the defendants.

By an Act of 1836 the defendants had acquired certain lands at Hessle for the purposes of their railway undertaking, and that Act gave them no power to acquire land for any other purpose.

Before September 15, 1903, all the fresh water required by the defendants' tenants occupying premises in the dock, or by ships using the dock, or by the defendants for purposes connected with the dock, was supplied by the corporation under their statutory powers.

On the last-mentioned date the defendants closed the mains or pipes through which the dock had up to that time been supplied with water, and stopped the supply by the corporation. Since that date the defendants had supplied the dock and ships and their tenants with water obtained from springs or wells on their land at Hessle. In consequence of this the plaintiffs brought this action, alleging that the defendants were unlawfully carrying on the business of a water company to the detriment

JOYCE J. 1905 ATTORNEY-GENERAL v. NORTH EASTERN RAILWAY.

of the corporation, and that the supply of water to the docks was ultra vires. They claimed an injunction against the company in the terms above stated.

Danckwerts, K.C., and *R. J. Parker*, for the plaintiffs. The defendants are not entitled to supply water for the purposes of the dock. For them to do so is ultra vires. The effect of s. 7 of the amalgamating Act is, notwithstanding the amalgamation, to keep the two undertakings, so far as powers are concerned, in two separate compartments. The dock company never had any power of supplying water, and it is submitted that the defendants cannot make use of water obtained from lands which they acquired for the limited purposes of their railway undertaking, for the purpose of supplying water to another undertaking. Under the Act of 1836 there was no power to acquire lands for any but railway purposes. Still less are the defendants entitled to sell or supply water to ships using the dock. To do that is to constitute themselves a water company. It may be that they are entitled to supply water for their own engines, but they cannot do more than that without special powers. It may be said that the purposes for which they are supplying water are incidental to or consequential upon their carrying on the dock undertaking, but companies cannot go beyond their statutory powers: *Mulliner* v. *Midland Ry. Co.* (1); *Bostock* v. *North Staffordshire Ry. Co.* (2); *Attorney-General* v. *Great Northern Ry. Co.* (3); *Ashbury Ry. Carriage and Iron Co.* v. *Riche* (4); *Attorney-General* v. *Great Eastern Ry. Co.* (5); *London County Council* v. *Attorney-General.* (6)

Neville, K.C., Hughes, K.C., and *W. Gutch*, for the defendants. The company is authorized to do all those things which relate to its undertaking. What the company is doing, therefore, is not ultra vires, for the supply of water is clearly incidental to or consequential upon the carrying on of the dock. Statutory powers can only be limited by statute: *Attorney-General* v. *Great*

(1) (1879) 11 Ch. D. 611.
(2) (1855) 4 E. & B. 798; (1856) 3 Sm. & Giff. 283.
(3) (1860) 1 Dr. & Sm. 154.
(4) (1875) L. R. 7 H. L. 653, 672.
(5) (1880) 5 App. Cas. 473.
(6) [1902] A. C. 165.

Eastern Ry. Co. (1) A company may use its land for any purpose not incompatible with its undertaking: *Foster* v. *London, Chatham and Dover Ry. Co.* (2); *London and North Western Ry. Co.* v. *Price* (3); *Attorney-General* v. *Great Eastern Ry. Co.* (4) It is doubtful whether the statement of the law in *Bostock* v. *North Staffordshire Ry. Co.* (5) is not too broad. The defendants being owners of the amalgamated undertakings can use the water which they possess for the purposes of either. The supply of water is both incidental and essential to the carrying on of the dock undertaking. The defendants could not compel the corporation to supply water for trade purposes.

Danckwerts, *K.C.*, in reply. Notwithstanding the amalgamation the two undertakings are for this purpose distinct. The Act only operated as a transfer of the undertaking of one company to another: ss. 37, 39, 45. The powers conferred by the Act of 1836 have not been enlarged. Companies are limited to their statutory powers or to such as are naturally incidental thereto: *Attorney-General* v. *Pontypridd Urban Council.* (6)

Cur. adv. vult.

Dec. 6. JOYCE J. The defendants work and maintain lines of railway running from the west along the north bank of the river Humber into the town of Kingston-upon-Hull, where they have stations for passengers and goods. They also own and work various docks, in particular St. Andrew's Dock, which is adjacent to these lines of railway lying between them and the river. By the side of their railway at Hessle, about a mile to the west of this dock, the defendants have wells and a pumping-station from which they have for many years past obtained water for the various purposes connected with their railway. There are and were before the year 1893, the date of the amalgamation Act, to which I shall presently refer, certain lines of railway within the docks running along the quays and joining the defendants' railway just outside the dock. Thus the goods,

(1) 5 App. Cas. 473.
(2) [1895] 1 Q. B. 711.
(3) (1883) 11 Q. B. D. 485.
(4) (1879) 11 Ch. D. 449.
(5) 4 E. & B. 798; 3 Sm. & Giff. 283.
(6) [1905] 2 Ch. 441.

JOYCE J. 1905 ATTORNEY-GENERAL v. NORTH EASTERN RAILWAY.

principally fish, landed at the dock and there loaded upon railway trucks, were carried direct by railway to the various stations for which they were destined. The docks before the amalgamation were a separate undertaking and belonged to a separate company—namely, the Hull Docks Company. Before the amalgamation the carriage and haulage of goods within the docks, under some arrangement with the dock company, were performed by the railway company in its own trucks by its own locomotives, and it has never been suggested, nor do I think it could be made out, that there was anything ultra vires or improper in this.

By the North Eastern Railway (Hull Docks) Act, 1893, the undertaking of the dock company was amalgamated with the undertaking of the railway company, and it was provided that thenceforward the two undertakings so amalgamated should constitute one undertaking, which should be the undertaking of the North Eastern Railway Company—that is, of the defendants; and both undertakings, therefore, are, subject to the provisions of the Act, to be worked as one undertaking.

The defendants, by means of a pipe or main underneath or along their lines of railway, take and convey water from their wells at Hessle to their stations in Hull, and also, by a branch pipe from their main, into the dock for all necessary purposes there in connection with the working both of the railway and the dock. A considerable quantity of fresh water is required in the dock for the supply of the hydraulic power for working the dock gates, the dock bridges, capstans, and cranes. It is also required and used for supplying the boilers of the steam engines which produce the hydraulic power, for the steam cranes and the locomotives on the docks, and for heating the fish stage, stores, and offices. There is also a very large quantity of water required for washing down the fish stage and the fish boxes after they are returned and before fresh fish is put into them.

Now this is an information by the Attorney-General at the relation of the corporation of Kingston-upon-Hull, who are seeking to compel the defendants to buy from them all the water required at the docks, although the relators are not bound and would not undertake to supply such water, and indeed could not

be absolutely depended upon to supply as much as may be necessary. The statement of claim asks for a declaration that it is ultra vires and illegal for the defendants to supply the dock with water obtained from the land at Hessle forming part of their railway undertaking, or to sell or supply such water to any tenants occupying premises within the dock, or to any ship using the dock, or otherwise to carry on the business of a water company. As to what I call the second part of the declaration claimed—namely, all included within the words " to carry on the business of a water company "—without going into details, I have come to the conclusion upon the evidence that the defendants are not carrying on the business of a water company or supplying water to any person or for any purpose to or for which the dock company would not if it still existed be legally entitled to supply water as the defendant company are now doing. In other words, the claim to what I have called the second part of the declaration asked for cannot in my opinion be sustained.

The real question in the action is whether the defendants are entitled to supply their dock with water obtained from their wells at Hessle, which were the property of the railway company before the acquisition by them of the dock and the amalgamation of the two undertakings. But of the water used in the dock some is required for railway purposes strictly so called, and obviously, in a sense, all the water that is there supplied and used is required and used, at least indirectly, for the benefit and increase of the railway traffic and for the public convenience in connection with such traffic, so far, at all events, as such traffic is from or to the docks—in other words, the fish traffic on the defendants' railway. But on behalf of the Attorney-General it is contended that, although the defendant company may be entitled to purchase from the corporation, or indeed, I suppose, from any other person who has it to sell, all such water as may be required for use in the dock, they are not entitled and it is ultra vires for them to take water from property originally acquired for their railway, and to convey such water by a pipe, or I suppose in any other manner, into the dock for use there. The defendant company, says the Attorney-General, are

JOYCE J. 1905 ATTORNEY GENERAL v NORTH EASTERN RAILWAY.

not entitled to use any part of their railway property in any manner whatsoever for any purpose of the docks, such user being altogether ultra vires and illegal. If this be correct, it would logically follow that, if the defendants were to purchase water or electric energy from anyone able and willing to supply it to them at Hessle or anywhere else on their line of railway, it would be illegal and ultra vires to convey or transmit the water or electric energy so purchased by any pipe or wire along or even across their railway into the dock for use there, inasmuch as the defendants would thereby be using for dock purposes a portion of the site of the railway, which no doubt was originally acquired for the purpose of the railway undertaking. This appears to me a somewhat startling contention, having regard to the fact of the amalgamation of the two undertakings. Prima facie I should have thought that the defendants at their engineering works, and at the expense of their united undertaking, might manufacture and repair all machinery and other appliances requisite for the working of the docks as well as the locomotives and other things used for their railway, and might get electric light for the dock as well as their railway from the same generating station, even though it were the fact that such engineering works or generating station stood upon land which was formerly the property of the railway company before the amalgamation. May not the defendants light their railway as well as the dock from a generating station situate upon land which before the amalgamation was the property of the dock company? Must there now and always be separate sets of engineering works and two generating stations, one to be used exclusively for the railway and the other exclusively for the dock? The dock company, being authorized to make and maintain the dock, might before the amalgamation have used any surface or underground water supply on its property for the necessary purposes of the docks. It might have purchased water anywhere from anyone having it to sell and had it conveyed by the railway to the dock for whatever use a supply of water might be required in working the dock undertaking. For whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized ought not, unless expressly prohibited.

to be held to be ultra vires. Moreover, any mode of enjoying a company's own land is impliedly permitted if it be not inconsistent with the provisions of the company's Acts, and is not an infringement of the rights of other persons. There is no suggestion that the defendants are by what they are doing infringing the rights of anyone. Are they transgressing any statutory prohibition? If they are it is some prohibition contained in the North Eastern Railway (Hull Docks) Act, 1893. That is an Act whereby, after reciting that the dock company are the owners of an extensive system of docks, basins, wharves, sheds, railways or tramways, warehouses, offices, and other buildings, works and appliances, and of a considerable quantity of land and other property, and that the North Eastern Railway Company are owners of the railway, by means of which railway access is afforded to and from the estate of the dock company, and after reciting that it is expedient—which I understand to mean expedient in the public interest—that the undertakings of the railway company and the dock company should be united, and that those companies should be amalgamated upon the terms and conditions in the Act contained, then s. 4 provides: "As on and from July 1, 1893, and subject to the provisions of this Act, the dock company shall be and is hereby dissolved and the undertaking of the dock company is hereby as from the date of amalgamation amalgamated with the undertaking of the railway company, and thenceforward the two undertakings so amalgamated shall constitute one undertaking, which shall be the undertaking of the company." In my opinion it follows that the one undertaking may and shall be worked as such, subject of course, to the provisions of the Act; but counsel for the Attorney-General rely upon s. 7, sub-ss. (i.) and (iv.). Now in the case of each of these companies there is a very large volume of Acts of Parliament, and I do not pretend to be able to explain and define completely the meaning of these sub-ss. (i.) and (iv.), but at all events it has not been pointed out to me, and I have not been able to discover, how the defendants are precluded from doing what they are doing by reason of the non-application to any portion of the amalgamated undertaking, other than the dock, of any of the provisions of the Dock Acts, which before

JOYCE J. 1905 ATTORNEY-GENERAL v. NORTH EASTERN RAILWAY.

the amalgamation applied exclusively to the dock undertaking or the company in respect thereof. Similarly, it has not been pointed out to me, and I have not been able to discover, how the defendants are precluded from doing what they are doing by reason of the non-application to the dock undertaking or the defendant company in respect thereof of the provisions of the Railway Acts, which before the amalgamation applied exclusively to the railway and the traffic thereon. The defendants must have fresh water at the dock, not only for strictly railway purposes, but for the working of the dock. The defendants might undoubtedly purchase water at Hessle or anywhere else on their line of railway, and convey it in tanks upon railway trucks down into the dock for consumption there. If they may convey such water in tanks, why not more conveniently and at less expense by a pipe or pipes into the dock? If at Hessle or any other place the defendants have a supply of water of their own, either upon the surface or underground, amply sufficient both for strictly railway purposes and for the dock, why may they not convey such water, either by tanks carried on wheels or by pipes on their own property, into the dock for all necessary purposes there? They have such a supply at Hessle, and I fail to see how what they are doing is ultra vires or illegal. Consequently in my opinion the action fails, and must be dismissed with costs.

Solicitors for plaintiffs: *Sharpe, Parker & Co., agents for E. Laverack, Hull.*

Solicitor for defendants: *A. K. Butterworth.*

G. A. S.

In re GORRINGE. GORRINGE *v.* GORRINGE.

JOYCE J.
1905
Dec. 14, 15.

[1905 G. 1272.]

Will—Construction—Gift to Children as a Class—Substitutional Gift to Issue —Issue of Parent dead at Date of Will.

A testator by his will gave legacies to the children of one of his sons, whom he described as "my deceased son." He gave the residue of his estate in trust for all or any of his children who should be living at his death and attain twenty-one or marry, "provided that in case any one or more of my children shall predecease me leaving any child or children living at my death, then such child or children of my deceased child shall take" their parent's share:—

Held, that the children of the son who was dead at the date of the will were not entitled to share in the residue.

Loring v. *Thomas*, (1861) 1 Dr. & Sm. 497, distinguished.

ADJOURNED SUMMONS.

Richard Gorringe, by his will dated July 27, 1898, after appointing executors and trustees, bequeathed the following (among other) pecuniary legacies: "To Mary Ann Malstead (formerly Gorringe) the wife of —Malstead of Melbourne, Australia, 300*l.* To Flory Gorringe 300*l.* To Kirk Gorringe (300*l.*). To Alfred Gorringe 400*l.*" The will then proceeded: "And in case any of the four last-mentioned legatees (children of my deceased son Alfred William Gorringe) shall at the time when his or her legacy would otherwise become payable be under the age of twenty-four and in the case of a female unmarried I direct that his or her legacy shall be invested by my trustees in any investments hereinafter authorized and that the whole or any part of the income thereof shall during such time as such legatee shall be under the age of twenty-four and in the case of a female unmarried be applied by my trustees at their absolute discretion for or towards the maintenance education advancement or benefit of such legatee."

The testator then bequeathed to his son Richard Power Gorringe a legacy of 200*l.* and an annuity of 50*l.* a year. He

JOYCE J. 1905 GORRINGE, *In re.* GORRINGE *v.* GORRINGE.

then recited as follows: "Whereas I am ignorant of the residence or whereabouts of my said son Richard Power Gorringe I expressly declare and direct that in case no communication either personally or by letter shall be received from my said son by my executors within three years after my death the legacy of 200*l.* and the annuity of 50*l.* hereinbefore respectively bequeathed shall both lapse as if my said son had predeceased me and shall fall into my residuary estate."

Then, after making various dispositions of other parts of his property, the testator devised and bequeathed the residue of his estate and effects to his trustees upon trust to sell and convert the same into money, and to stand possessed of the trust premises: "In trust for all or any my children or child (other than and except the said Richard Power Gorringe) who shall be living at my death and being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age and if more than one in equal shares. Provided that in case any one or more of my children (other than the said Richard Power Gorringe) shall predecease me leaving any child or children living at my death then such child or children of my deceased child (other than the said Richard Power Gorringe) shall take and if more than one in equal shares the share which his her or their parent would have taken if such parent were living and over the age of twenty-one at my decease."

The testator died on April 9, 1905. He was twice married, and had nine children, two by his first wife—Mary Ann Gorringe (now Mrs. Twigg) and Alfred William Gorringe—and seven by his second wife, the eldest of the seven being the said Richard Power Gorringe. Alfred William Gorringe was dead at the date of the will and had left five children, to four of whom legacies were given by the will, as above stated. Doubts having arisen as to whether the children of Alfred William Gorringe were entitled to share in the testator's residuary estate, this summons was taken out by the trustees for the determination of that question. The amount of the residue was large; it appeared that the share which the children of A. W. Gorringe would take, if held entitled, would be about 15,000*l.*

Younger, K.C., and *Ryland*, for the trustees.

J. F. Waggett, for T. J. H. Gorringe, one of the testator's sons. The children of A. W. Gorringe do not take. The rule in these cases is that if the gift be substitutional in form then the issue of a child dead at the date of the will do not take. If there be an alternative or second original gift to the issue, then they do take. It is entirely a question of intention upon each will. Here the gift is to the four children of A. W. Gorringe, whom the testator has described as his deceased son. He has defined his children as being all his children living at the date of his will. He is dealing with his own children, and of course knows all the facts concerning them.

Hughes, K.C., and *A. Adams*, for three of the testator's daughters. On the construction of this will it is submitted that the rule in *Christopherson* v. *Naylor* (1) applies: Hawkins on Wills, p. 250. In *Loring* v. *Thomas* (2), which will be relied upon against us, the gift was a substantive gift to issue, and not as here a substitutional gift engrafted on a prior gift to a class: Hawkins on Wills, p. 249. In *In re Musther* (3) *Christopherson* v. *Naylor* (1) was approved. *Waugh* v. *Waugh* (4) is much in favour of the view we ask the Court to take. On the words of this will it is impossible to suppose that the testator meant the children of A. W. Gorringe, whom he knew to be dead at the date of the will, to share in the residue. He has otherwise provided for them by giving them legacies. [They also referred to *In re Offiler*. (5)]

A. F. Peterson, for Mrs. Twigg.

W. F. Hamilton, K.C., and *G. F. Hart*, for another daughter of the testator.

Badcock, K.C., and *Fildes*, for the children of A. W. Gorringe. This case is covered by *Loring* v. *Thomas*. (2) The words "shall predecease me" do not necessarily import futurity. They are here equivalent to "shall have predeceased me." In *Hannam* v. *Sims* (6), although the words were "shall die" the Court of Appeal let in children of a son who was dead at the date of the

(1) (1816) 1 Mer. 320.
(2) 1 Dr. & Sm. 497.
(3) (1890) 43 Ch. D. 569.
(4) (1833) 2 My. & K. 41.
(5) (1901) 83 L. T. 758.
(6) (1858) 2 De G. & J. 151.

JOYCE J. 1905 GORRINGE, *In re.* GORRINGE *v.* GORRINGE.

will. Having regard to the amount of the estate the legacies given to the children of A. W. Gorringe cannot be deemed an adequate provision for them. [They also referred to *In re Chapman's Will* (1); *In re Woolrich* (2); *Tytherleigh* v. *Harbin* (3); *Coulthurst* v. *Carter* (4); and *Etches* v. *Etches.* (5)]

Waggett, in reply.

JOYCE J. In my opinion no case has been cited to me in which the terms of the will and the surrounding circumstances were identical with or even very similar to those in the present case.

The testator begins by providing for the children of his son Alfred, and particularly mentions that Alfred is deceased, so that the fact of his death is clearly present to the testator's mind, and there is no room for attributing to him forgetfulness or ignorance of it. He then goes on to deal, in a rather peculiar manner, with his son Richard, the reason for that, no doubt, being that he was ignorant of this son's whereabouts. Then follows a gift of the residue in these words: "In trust for all or any my children or child (other than and except the said Richard Power Gorringe) who shall be living at my death." Of course he did not intend Alfred to take anything under that, and then he goes on: "In case any one or more of my children (other than the said Richard Power Gorringe) shall predecease me"; and, as has been pointed out, he is dealing with his own children, and knows the facts concerning them. [His Lordship then concluded the reading of the will and continued:—] It is quite true that the words by themselves would include the children of Alfred if we are to read them, not in their strict grammatical meaning, but in a wider sense. But it seems to me that this would be an odd mode of providing for Alfred's children even if he had not left them pecuniary legacies. I have come to the conclusion, on reading the whole of the will, that the testator has simply meant what he said according to the strict meaning of the words. The strongest case against this view is *Loring* v. *Thomas.* (6) That case shews that words of futurity may be read as applying to the

(1) (1863) 32 Beav. 382.
(2) (1879) 11 Ch. D. 663.
(3) (1835) 6 Sim. 329.
(4) (1852) 15 Beav. 421.
(5) (1856) 3 Drew. 447.
(6) 1 Dr. & Sm. 497.

past, but there is no rule that they shall be so read, and, as Kindersley V.-C. says, it is always a question of intention to be gathered from the words of the will. He says (1): "When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of a child who was already dead at the date of the will." The question is whether the testator intended to include not only the children of children who should thereafter predecease him, but also those of Alfred, whom he knew to be dead at the date of the will, and for whose children he had provided. In my opinion it is quite clear that he meant what he said, and did not intend to include the children of Alfred. I may add that the consideration as to the words "shall live to attain the age of twenty-one years" which determined Kindersley V.-C.'s decision in *Loring* v. *Thomas* (2) is entirely wanting in this case.

Solicitors: *Lumley & Lumley; Guscotte, Wadham & Co.; Schultz & Son; Bridgman & Willcocks.*

(1) 1 Dr. & Sm. 510. (2) 1 Dr. & Sm. 497, 517.

G. A. S.

JOYCE J. 1905 Dec. 8, 12, 19

NORTH EASTERN MARINE ENGINEERING COMPANY v. LEEDS FORGE COMPANY.

[1905 N. 807.]

Patent—Practice—Expired Letters Patent—Action for Declaration of Invalidity—No Consequential Relief—Declaratory Order—Discretion of Court—Rules of the Supreme Court, 1883, *Order* XXV., *r.* 5—*Mode of Procedure—Petition for Revocation—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 26, 32.

An action claiming merely a declaration of invalidity of letters patent already expired, where no legal right of the plaintiff has been infringed, is not maintainable.

Semble, the proper mode of procedure is by a petition for revocation under s. 26 of the Patents, Designs, and Trade Marks Act, 1883.

Order XXV., r. 5, discussed.

THIS was an action which came on for argument upon points of law involved in the pleadings.

Some years previous to the year 1900 the present defendants had purchased certain letters patent (No. 8591 of 1889) which had been granted to one Devis for an invention of "An Improved Boiler Flue," and which expired by effluxion of time on May 23, 1903. In March, 1900, they commenced an action against Deighton's Patent Flue and Tube Company to restrain them from infringing the patent, and in that action the House of Lords, in May, 1904, reversing the judgment of the Court of Appeal and restoring the judgment of Cozens-Hardy J., decided that the patent had been infringed.

Previously to the hearing of the appeal in the House of Lords, the present plaintiffs had purchased from the Deighton Company boiler flues identical in form with those which were the subject of that action. In 1901, 1902, and June, 1904, the present defendants wrote letters to the present plaintiffs threatening them with an action in respect of the use of the boiler flues so purchased, and in June, 1904, commenced an action against them claiming damages for infringement, but discontinued proceedings in that action in the following year.

In these circumstances the present plaintiffs, deeming that they were still subject to be proceeded against by the present defendants for damages in respect of the boiler flues in question, commenced this action on June 14, 1905. In their statement of claim the present plaintiffs stated the facts above set out and referred to the threatening letters, and also alleged that the letters patent in question were invalid, stating that their validity was said by Cozens-Hardy J., the Court of Appeal, and the House of Lords, in the action above-mentioned, to have been admitted by the defendant company in that action, and that the question of validity was not in fact tried. They claimed—(1.) a declaration that the letters patent were invalid at the date thereof, and were so continuously down to the date when the term for which they were granted expired; (2.) a declaration that the plaintiffs had not infringed any legal rights of the defendants; and (3.) damages. The statement of claim contained no allegation that the threats were made mala fide, or without reasonable or probable ground.

The defendants pleaded, in the first place, that the action purported to be an action for damages for threats pursuant to s. 32 of the Patents, Designs, and Trade Marks Act, 1883, and that the plaintiffs had no cause of action under that section, inasmuch as (1.) the defendants had with due diligence commenced and successfully prosecuted up to the House of Lords an action for infringement of the patent, and (2.) no action under that section could be brought for threats in respect of letters patent which had expired before the commencement of the action. The defendants further pleaded that there was no such action known to the law as an action for declaration of invalidity of letters patent which had expired previously to the commencement of the action.

By an order made in this action on August 11, 1905, upon the application of the defendants, it was ordered that the following point of law—namely, whether the plaintiffs were entitled to relief - be set down to be argued before the Court, the defendants admitting, for the purpose of the argument of the points of law, the allegations of fact in the statement of claim contained.

Upon the point of law now coming on for argument, counsel

JOYCE J. 1905 NORTH EASTERN MARINE ENGINEERING COMPANY v. LEEDS FORGE COMPANY.

for the plaintiffs intimated that they did not insist or rely upon s. 32 of the Act, or upon the claim for damages.

Moulton, K.C., *Bousfield, K.C.*, *A. J. Walter*, and *Colefax*, for the defendants. There is no precedent for an action of this nature claiming merely a declaration that expired letters patent were invalid, which is all that the plaintiffs ask now that they have given up their other claims. The Court will not in a case like this exercise its discretion in the plaintiffs' favour and make a declaratory order when no consequential or ancillary relief is sought.

Astbury, K.C., and *J. C. Graham*, for the plaintiffs. It is admitted for the purposes of the present argument that the letters patent were invalid. We submit that the plaintiffs are entitled to be protected against any action which may be brought against them hereafter by the defendants in respect of breaches of the patent while it existed. The defendants have intimated that such an action may be brought in the future. They discontinued their previous action against the present plaintiffs because they did not want to have to fight the question of the validity of the patent, and these plaintiffs, desiring not to have this action for damages held over them indefinitely, have taken these proceedings. The Court has jurisdiction to make a declaratory judgment such as is now asked, and has frequently exercised it: *Young* v. *Ashley Gardens Properties, Ld.* (1); *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2); *Llandudno Urban Council* v. *Woods* (3); and *Ellis* v. *Duke of Bedford.* (4)

[JOYCE J. Is not a petition for revocation your proper course? If after the expiration of a patent an action can be brought in respect of previous infringement, surely there can be a petition for revocation of expired letters patent?]

There is no reported decision on the point. If the patent had not expired no doubt the plaintiffs could have proceeded by a petition for revocation. The plaintiffs considered the question of procedure, and decided to adopt the present course, thinking

(1) [1903] 2 Ch. 112.
(2) [1892] 3 Ch. 242.
(3) [1899] 2 Ch. 705.
(4) [1899] 1 Ch. 494.

that a petition for revocation might fail on the technical objection that the patent had expired. It is really only a matter of form whether the proceedings are by petition for revocation or by an action for a declaration of invalidity. The plaintiffs are not bound to wait until the defendants choose to bring an action, but are entitled to remove, if possible, the fear of such an action out of their way. They do not insist or rely on their other claims, but now ask merely for the declarations, and those the Court has power in its discretion to make under Order xxv., r. 5, notwithstanding that the plaintiffs seek no consequential relief. In *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1) the present Master of the Rolls intimated that a declaration should be ancillary to the enforcement of some legal right, but that was only a dictum, and the words of Order xxv., r. 5, are express. There could not be a stronger case for the exercise by the Court of its discretion in favour of the plaintiffs.

Bousfield, *K.C.*, in reply. There is no case in which the Court has made a declaration except where it has been ancillary to the enforcement of some legal right. In both *Young* v. *Ashley Gardens Properties*, *Ld.* (2) and *Ellis* v. *Duke of Bedford* (3) it was a question of enforcing legal rights: *Faber* v. *Gosworth Urban Council* (4) shews that the jurisdiction to make declaratory orders must be exercised with extreme caution, and in that case the Court refused to make any declaration on the ground that no legal rights had been infringed and matters were still in fieri. In *Barraclough* v. *Brown* (5) Lord Davey dissented from the view that, although the High Court could not make any judgment or give any relief in that action, the Court nevertheless might make a declaration binding the rights of the parties, and he discusses the reason and limits of Order xxv., r. 5, and refers to the case of *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (6) as an illustration of the use of the rule. In *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1), the present Master of the Rolls says that the declaration must be ancillary to putting in

(1) [1904] 2 K. B. 44.
(2) [1903] 2 Ch. 112.
(3) [1899] 1 Ch. 494.
(4) (1903) 88 L. T. 549.
(5) [1897] A. C. 615, 623.
(6) [1892] 3 Ch. 242.

JOYCE J. 1905 NORTH EASTERN MARINE ENGINEERING COMPANY v. LEEDS FORGE COMPANY.

force some legal right, and in that case the declaration was not made because there had been no violation of any legal right. This is not a proper case for the exercise by the Court of any discretion in favour of the plaintiffs.

Cur. adv. vult.

Dec. 19. JOYCE J. This case has been somewhat simplified by the statement made by counsel for the plaintiffs that no reliance is placed upon s. 32 of the Patents, Designs, and Trade Marks Act, 1883, or upon the claim for damages in the statement of claim. At the same time I think the claim for damages could not have been maintained, because upon the face of the pleadings, it does not appear that the threats complained of were not made bona fide and without reasonable or probable ground. The action is thus reduced simply to a claim for two declarations—namely, (1.) that the letters patent in question were invalid at the date thereof, and were so continuously down to the date when the term for which they were granted expired; and (2.) that the plaintiffs had not infringed any legal rights of the defendants. No further relief is asked—I am omitting the claim for damages by reason of what was said at the hearing—nor could any relief have been given before the Judicature Act, because there are no equitable grounds alleged nor any matters of equity upon which the defendants could have been restrained from suing the plaintiffs.

The old rule as to an action for a declaration was that such an action could not be maintained unless the plaintiff would be entitled to some consequential relief, whether he asked for it or not. Order xxv., r. 5, of the Rules of the Supreme Court, 1883, introduced a new rule, which provides that "no action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." To the operation of that rule there must, however, be some limitation. It cannot, I think, compel the Court to entertain any and every action for a declaration, and it cannot be that a claim for any declaration whatsoever it may be is a good ground of action.

What the limitation is I am not prepared to say, and I am not going to attempt to define it. There is an obiter dictum of the present Master of the Rolls in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1), that the declaration claimed must be ancillary to putting in suit some legal right. Whether this be as plain and satisfactory a definition as could be wished I venture to doubt, but both sides agreed in saying that it was a matter for my discretion, a discretion which if it exists, according to the cases, must be exercised with extreme care and caution.

Really, this action is an action to have it declared that the present plaintiffs would have a good ground of defence if and when the present defendants sue them for infringement of the patent in question, which they may or may not do, and in order to determine this, if the action proceeded, there would have to be a trial with a large and possibly extravagant expenditure on both sides, but in particular by the present defendants, with special counsel and expert witnesses and the like, as is usual in patent cases.

Now, it seems to me that the first objection to this action is that the plaintiffs' proper remedy is that provided by s. 26 of the Patents, Designs, and Trade Marks Act, 1883, namely, a petition for revocation of the letters patent. I am aware that the term limited by the patent has expired, but no satisfactory or even plausible reason has been suggested to me why the procedure by way of petition for revocation is not available to the present plaintiffs in the circumstances of the present case. Even if this were not so, and the matter be purely one for the discretion of the Court, it appears to me that the present defendants have broken no contract, and have committed no tort; it is not a case of conflicting claims to real and personal property; there is no dispute as to the rights or obligations of the respective parties under a will or other instrument, the true construction whereof required to be determined by the Court, or anything of that kind. Speaking generally, in simple cases not within s. 32 of the Act, the mere fact that A. is supposed to contemplate the bringing of an action against B., or that A. may have stated that he has grounds for such an action, does not, in my opinion,

(1) [1904] 2 K. B. 44.

JOYCE J. 1905 NORTH EASTERN MARINE ENGINEERING COMPANY v. LEEDS FORGE COMPANY.

entitle B. to institute an action against A. to have it declared that A. has not a good cause of action against B. I think that is so whether the result depends merely upon questions of law, or upon facts, as to which there would, or might be, a conflict of evidence and a protracted trial. No doubt delay may in certain cases furnish a good ground of defence; but, ordinarily, an intending plaintiff may postpone his action as long as he pleases, at the risk of finding himself ultimately barred by some Statute of Limitations, and he may choose his own time for commencing proceedings. He is entitled to wait until he has collected the necessary evidence, or has made such inquiries as he thinks fit, or has obtained the requisite funds, or what not. Generally, notice by A. to B. of an intended suit does not give B. a cause of action against A. To give such a notice is ordinarily a right and proper thing to do. Indeed, in some cases it is required by statute. Sect. 32 of the Act of 1883 being out of the way, I think that, at the risk of defeat and costs, the Leeds Forge Company are entitled if and when they please to bring an action against the North Eastern Marine Engineering Company for alleged infringement of the patent.

If I have any discretion, I decline to exercise it in favour of the present plaintiffs, notwithstanding their ingenuity in devising this novel form of action, which, in my opinion, is misconceived, and pursuant to the provisions of Order xxv., r. 4, I order the action to be dismissed with costs.

Solicitors: *J. H. & J. Y. Johnson, for Carter, Ramsden & Carter, Leeds; Vincent & Vincent, for Day & Yewdall, Leeds.*

R. M.

McMILLAN *v.* LE ROI MINING COMPANY, LIMITED.

JOYCE J.

1905

Dec. 20.

[1905 M. 3299.]

Company—Voting—"Personally or by Proxy"—Poll—Power of Chairman to direct Manner of Taking—Polling Papers—Invalidity.

The articles of a company provided in the ordinary way for votes being given either personally or by proxy, the appointment of proxies, &c., but that if a poll was demanded it should be taken "in such manner and at such time and place as the chairman of the meeting directs." At a general meeting of the company, a resolution having been lost upon a show of hands, the chairman demanded a poll and directed that it should be taken by means of polling papers signed by the members and delivered at the offices of the company on or before a fixed day and hour:—

Held, that, having regard to the terms of the articles, such a mode of taking the poll was unauthorized and invalid.

MOTION.

This was a motion on behalf of the plaintiff and all other shareholders of the defendant company, except the defendant directors, for an injunction to restrain the company and the directors from acting upon any resolution purporting to be passed by the use of voting papers used as votes of the members signing the same on a poll demanded at a general meeting of the company held on December 8, 1905.

The meeting in question was held for the purpose of deciding whether the company was to be worked in future as a separate company, or should be included in a new company to be formed by its amalgamation with several other existing companies. There was considerable discussion at the meeting, at the close of which the chairman submitted a resolution that the proposed scheme of amalgamation should be carried into effect. Upon a show of hands there was a large majority against the resolution. The chairman then demanded a poll, and directed that it should be taken by means of polling papers to be sent to the shareholders for signature, and to be returned to the offices of the company by twelve o'clock noon that day fortnight. Other resolutions were subsequently put and carried or lost upon a

JOYCE J. 1905 McMILLAN v. LE ROI MINING COMPANY, LIMITED.

show of hands, and in each case the chairman demanded a poll, all the polls to be taken together in the manner directed as to the first.

In pursuance of the chairman's direction polling papers were sent out to the shareholders in the following form:—

"Le Roi Mining Company, Limited. Polling Paper.

"To be filled up and signed by shareholders recording their votes upon the following resolutions proposed at the general meeting held on the 8th December, 1905. Shareholders who are in favour of any resolution must leave the word *For* and strike out the word *Against*. Shareholders who are against any resolution must leave the word *Against* and strike out the word *For*. The polling paper to be effective must be signed at the foot thereof and lodged at the offices of the Company, 541, Salisbury House, London Wall, London, E.C., not later than twelve o'clock, noon, on Friday, the 22nd December, 1905."

Then followed the resolutions set out in order with the words "For" and "Against" printed opposite to each of them, and at the foot of the paper was left a blank space intended for the signature and address of the shareholder, together with the date.

The articles of the company provided (art. 85) that every question submitted to a meeting should be decided in the first instance by a show of hands; and (art. 87) that if a poll was demanded it should be taken "in such manner and at such time and place as the chairman of the meeting directs, and either at once or after an interval or adjournment or otherwise, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded."

Art. 91 was as follows: "On a show of hands every member present in person or by proxy shall have one vote, but at a poll every member present in person or by proxy shall have one vote for every share held by him."

Art. 94 provided that: "Votes may be given either personally or by proxy. The instrument appointing a proxy shall be in writing, under the hand of the appointor or his attorney, or if such appointor is a corporation, under its common seal. No person shall be appointed a proxy who is not a member of the

company and qualified to vote, except that a corporation being a member may appoint any one of its officers to be its proxy, who is not himself a member"; and

Art. 95 that: "The instrument appointing a proxy and the power of attorney (if any) under which it is signed shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting or adjourned meeting (as the case may be) at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution."

Younger, K.C., and *Kirby*, for the plaintiffs. The method of voting by polling papers is irregular and invalid. It is submitted that it is a device to get over the obligations of art. 94, by enabling persons who are not present to register votes without properly-constituted proxies. Under the provisions of the articles there are only two ways in which votes may be given—either on a show of hands or on a poll. No vote can be tendered either at a meeting or at a poll, except it be by a member personally or by a properly-constituted proxy for a member; and in the case of a proxy it must have been sent in forty-eight hours before the meeting. If in point of fact the articles of a company do not form a complete code dealing with the subject, nothing can be added except such right as would be enjoyed by the shareholders at common law. The right of voting by polling papers is unknown to the common law. Voting is a matter of contract under the articles. In the absence of any contract, personal voting is the only possible method: *Reg.* v. *Wimbledon Local Board* (1); *In re Horbury Bridge Coal, Iron and Waggon Co.* (2)

Under the Public Libraries Amendment Act, 1877 (40 & 41 Vict. c. 54), a local authority may ascertain the opinions of the majority of the ratepayers by means of voting papers, and voting papers are also allowed in University elections, but those are statutory exceptions from the general law. The method of voting by polling papers would avoid s. 51 of the Companies

(1) (1882) 8 Q. B. D. 459. (2) (1879) 11 Ch. D. 109.

JOYCE J. 1905 McMILLAN v. LE ROI MINING COMPANY, LIMITED.

Act, 1862, and would enable the chairman to get rid of the articles intended for the protection of the shareholders. Both under the articles and on the authorities this method of voting is unauthorized and illegal.

Gore-Browne, K.C., and *W. H. Cozens-Hardy*, for the defendants. It is within the authority of the chairman to direct the method of taking the poll (art. 87). It may be taken in any manner which is not contrary to natural justice or to common law or statute. It is contended that the shareholder must himself come to the poll and drop his voting paper in the box. The shareholder may be said in effect to be present when he signs the voting paper. The poll consists in the delivery of the vote, and the chairman has, consistently with the articles, directed that it shall be delivered in a certain way.

JOYCE J. I do not think there is much doubt about this case. It appears to me that, prima facie, in order to vote the person who is entitled to vote must attend and personally give his vote, unless he be voting under some statute or regulation or some other authority which entitles him to vote in a different manner.

In the present case it is perfectly plain, to my mind, on these articles, that a shareholder must vote either in person or by proxy—that is, through the agency of another shareholder (and it is limited to shareholders) of the company, who must be present if the shareholder himself is not present. Voting papers are not contemplated by these articles, and it seems to me that the use of voting papers would be at variance with different expressions that do occur in these articles.

It has been urged upon me by counsel for the company that the chairman may direct the manner in which the poll is to be taken; but that does not entitle him to enlarge the power of voting. He cannot, in doing that, alter the rule, whatever it may be, as to the personal attendance of the voter, or of the person who is appointed to be his proxy.

In my opinion, what the defendants are proposing to do in this case is inconsistent with the regulations of the company, and therefore it is irregular and invalid.

I make the following order:—The Court, being of opinion that the mode that has been adopted by the chairman of taking the poll by voting papers is unauthorized and invalid, restrain the defendants from acting upon the result of any poll or alleged poll so taken.

Solicitors: *Ashurst Morris, Crisp & Co.; Burn & Berridge.*

G. A. S.

CARLISH *v.* SALT.

[1905 C. 651.]

Vendor and Purchaser—House in London—Open Contract—Adjoining House—Party Wall Notice and Award—Non-disclosure—Material Fact—Defect in Title—Obligation to Disclose—Rescission—Return of Deposit—Cost of investigating Title—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 90, 91, 98, 99.

The service of a party wall notice under the London Building Act, 1894, and the issue of the usual award throwing upon the owner the liability to contribute a proportion of the cost of the party wall works when completed, are material facts which a vendor is under an obligation to disclose to an intending purchaser, inasmuch as they affect the purchase price and constitute a latent defect in the title to the property; and non-disclosure, however innocent, will afford the purchaser sufficient ground for obtaining rescission of his contract, followed by return of the deposit with interest, and payment of the costs of investigating the title.

Stevens v. *Adamson*, (1818) 2 Stark. 422, followed.

WITNESS ACTION.

The defendants George Moultrie Salt and Spencer William Grant were the owners in fee of a freehold messuage and premises, No. 9, Portsmouth Street, Lincoln's Inn Fields, Middlesex. Although in the occupation of a tenant paying rent, the property was in a tumble-down condition, and in the ordinary course of events, having regard to the changes in the neighbourhood, the rebuilding of No. 9 was to be expected at an early date.

On November 2, 1903, a party wall notice was served on the defendants, under s. 90 of the London Building Act, 1894, whereby the owner of the premises, No. 10, Portsmouth Street, adjoining the defendants' premises, gave notice of his intention

JOYCE J. 1905 CARLISH v. SALT.

as building owner to execute the works therein mentioned in connection with the party wall separating No. 10 from No. 9. In pursuance of this notice the respective surveyors of the building owner and the defendants made their award under s. 91 of the London Building Act, 1894, on October 10, 1904. By the award it was agreed (inter alia): (1.) that the wall separating No. 10 from No. 9 was for the purposes of the award a party wall; (2.) that the said wall was of insufficient strength for the purposes of the building owner, and having been condemned by the district surveyor should be forthwith rebuilt by the building owner, the centre line of the new wall being upon the centre line of the old wall; and (3.) that the whole of the works mentioned in the award should be carried out at the expense of the building owner, but that in consideration of the fact that the party wall had been condemned by the district surveyor, the defendants, as the owners of No. 9, should pay to the building owner their share of the cost of the contemplated works when the same were completed. Upon the making of the award, the building owner proceeded forthwith to carry out the works referred to in the party wall notice and to take down the party wall.

On October 12, 1904, the plaintiff entered into an open contract with the defendants, for the purchase of No. 9, Portsmouth Street, at the price of 1950*l.*, and paid a deposit of 195*l.* The date fixed for completion was December 25, 1904. Although the contract was only two days subsequent in date to the award, nothing was said by the defendants about the party wall notice or award, and the purchaser entered into the contract in complete ignorance of those proceedings. An abstract of title was delivered in due course, and the title to the property as thereby disclosed was approved.

On November 4, 1904, in consequence of the condemnation of the premises by the district surveyor, a dangerous structure notice under the London Building Act, 1894, and the Amendment Act, 1898, was served upon the defendants, requiring them to take down forthwith certain portions, and to shore up the structure immediately. At the same time that this notice was brought to the attention of the plaintiff, the fact of the party wall notice and

award was also communicated to him. Thereupon the plaintiff's solicitor wrote demanding compensation in respect of the party wall notice and stating that had the plaintiff known of it he would have had nothing to do with the property. The defendants refused to make any compensation, and on January 6, 1905, the plaintiff's solicitor wrote requesting the return of the deposit.

On February 22, 1905, the writ in this action was issued, claiming rescission of the contract, repayment of the deposit with interest, and payment of 24*l.* 1*s.* 10*d.* being the costs and expenses of the negotiations and investigation of the title.

In the meantime the defendants had, in pursuance of a magistrates' condemnation order dated December 5, 1904, completely pulled down the house upon the site in question, and upon the institution of this action they treated the contract as abandoned, and had themselves rebuilt No. 9, and claimed to forfeit and retain the deposit.

In the circumstances, the only question between the parties was whether the plaintiff was entitled to a return of the deposit with interest, and to payment of the costs of investigating the title.

No fraudulent intent was imputed to the defendants in not disclosing the fact of the party wall notice and award previous to the contract for sale.

At the trial, the defendants called evidence to prove that the plaintiff bought the property with the object of pulling down the existing structure and building a new house on the site.

Younger, K.C., and *Cozens-Hardy*, for the plaintiff. The plaintiff is entitled to a return of his deposit with interest. The award was made two days before the date of the contract, and under it the owner of the property sold was liable to contribute towards the cost of the party wall works when completed, and by virtue of s. 98 of the London Building Act, 1894, the building owner can recover the amount of the contribution as a debt, and until the contribution is paid the entire ownership of the wall is vested in him by virtue of s. 99 of the Act. In effect this is a new contract with a third party which the defendants cannot compel the plaintiff to enter into, and the latter is

JOYCE J. 1905 CARLISH v. SALT.

entitled to be repaid his deposit with interest: *In re Bryant and Barningham's Contract.* (1)

We submit that the plaintiff was not bound to accept the title subject to this incumbrance. A similar question was suggested but not decided by Rigby L.J. in his judgment in *In re Leyland and Taylor's Contract.* (2) It was the duty of the vendors to disclose the fact of the service of the party wall notice, and non-disclosure entitles the plaintiff to rescission and return of his deposit. In *Stevens* v. *Adamson* (3), quoted with approval in *In re Leyland and Taylor's Contract* (2), the vendor did not disclose the fact that his landlord had given him notice that he would re-enter if the premises were not put into repair within three months, and the purchaser was held entitled to the return of his deposit, notwithstanding that he was aware of the dilapidated state of the premises at the time of the sale. It is not suggested that there was any fraud on the part of the vendors, but the contention is that it was their duty to disclose to a purchaser the existence of this notice, and that, as they did not discharge that duty, the purchaser is entitled to repayment of his deposit.

The question of silence as regards a material fact was discussed by Chitty J. in *Turner* v. *Green* (4), and he said that the obligation to speak was at the root of the matter. Non-disclosure of a material fact which the vendor is under an obligation to disclose entitles the purchaser to rescission and gives him a good defence to specific performance: Fry on Specific Performance, 4th ed. p. 307, par. 705. That the notice and award constituted a material fact in this case is obvious, having regard to the provisions of ss. 98 and 99 of the London Building Act, 1894.

With regard to the costs of investigating the title, the purchaser is entitled to be put in the same position as if he had not entered into the contract. He is entitled to an indemnity similar in principle to that given in *Whittington* v. *Seale Hayne* (5), in which Farwell J. referred to the judgment of Bowen L.J. in *Newbigging* v. *Adam.* (6) The defendants in this case were

(1) (1890) 44 Ch. D. 218.
(2) [1900] 2 Ch. 625, 632.
(3) 2 Stark. 422.
(4) [1895] 2 Ch. 205, 208.
(5) [1900] W. N. 31.
(6) (1886) 34 Ch. D. 582.

under an obligation to shew a good title. They delivered an abstract inviting the plaintiff to accept the title, and consequently the investigation of the title was an obligation on him.

Hughes, K.C., and *R. E. Moore*, for the defendants. The plaintiff bought this property with the object of pulling down the house and rebuilding it. Therefore, in the first place, the service of the party wall notice was not a material fact which the defendants were under an obligation to disclose; and further, even assuming that it was a material fact, it was only something in the nature of an incumbrance or outgoing, and afforded no ground to the purchaser for refusing to carry out the contract until he had given the defendants an opportunity of clearing it off.

With regard to the former contention, the house was in a tumble-down condition, and it was a positive advantage to the purchaser to have the wall rebuilt by the adjoining owner. Purchasers of houses in London must be taken to be aware that party wall notices may be served at any time, and the fact that the notice has been given does not increase or alter this liability. The words of Lord Alverstone M.R. in *In re Leyland and Taylor's Contract* (1) are directly applicable. He says that a purchaser buying such property "must be taken to have known that such a notice might be served at any time, and to have bought subject to such a contingency. And, in my opinion, the fact that the notice was served at one time or the other could not possibly have affected the value of the property sold for the purpose of the contract," and the judgments of the Lords Justices are to the same effect. In the circumstances, this party wall notice did not affect the value of the property, and was an advantage rather than a disadvantage. *Stevens* v. *Adamson* (2) is not in point. The facts in that case were entirely different from those here, for there the vendor had not disclosed the fact that a notice of forfeiture had been given, and the purchaser was ultimately ejected.

With regard to the defendants' further contention, the existence of this notice did not give the plaintiff a right to rescind forthwith It was at most an incumbrance which the defendants should have

(1) [1900] 2 Ch. 625, 630. (2) 2 Stark. 422.

JOYCE J. 1905 CARLISH v. SALT.

had an opportunity of clearing off. If the parties could not have agreed, a vendor and purchaser summons was the proper method of deciding any question. Instead of adopting that course, the plaintiff refused to complete, and the defendants, acting on that refusal, did not offer to remove the incumbrance. In the circumstances, they are justified in claiming to forfeit and retain the deposit. The plaintiff having failed to perform his contract within a reasonable time, has no right now to the return of the deposit: *Howe* v. *Smith* (1); *Soper* v. *Arnold*. (2)

Cur. adv. vult.

Dec. 21. JOYCE J. stated the facts as above set out, and continued:—This is not an action to set aside for fraud a purchase completed by conveyance and payment, but is an action simply to get payment back of the deposit and expenses of investigating the title under the circumstances I have mentioned.

I have to determine a question similar to that suggested, but not decided, by Rigby L.J. in *In re Leyland and Taylor's Contract*. (3) It is admitted that nothing was said about the party wall notice or award previously to the date of the contract, but no fraudulent intent is imputed to the defendants. I hold that the party wall notice and the award constituted a material fact affecting the price to be paid, and in so far as they imposed a liability of uncertain amount at some future time on the owner of the premises, I am of opinion that they constituted a latent defect not in the quality of, but in the title to, the property, and ought to have been disclosed.

Now the proposition has been laid down by Sir Edward Fry in his book (3rd ed. p. 325, par. 705) and adopted by Chitty J. in *Turner* v. *Green* (4)—and I see no reason to doubt its correctness—that "mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance." In other words, mere non-disclosure on the part of the vendor, apart from circumstances imposing a duty upon him to disclose

(1) (1884) 27 Ch. D. 89.
(2) (1889) 14 App. Cas. 429.
(3) [1900] 2 Ch. 632.
(4) [1895] 2 Ch. 205, 208.

or inform the other party, it does not entitle the purchaser to avoid his contract.

In the case of the sale of a chattel, the law as stated by Bramwell B. in *Horsfall* v. *Thomas* (1) is that if there be a defect known to the manufacturer, and which cannot be discovered on inspection, he is bound to point it out. Upon consideration of the authorities, I am of opinion that the vendor of real estate is under a similar obligation with respect to a material defect in the title, or in the subject of the sale, which defect is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions. That I understand to have been the opinion of Sir William Grant in *Edwards* v. *M'Leay* (2) and of Lord St. Leonards as appears from the discussion by him of the same case, and of *Gibson* v. *D'Este* (3) in his "Treatise of the Law of Property as administered by the House of Lords" (see pages 654, 655). The point was also dealt with by Lindley J. in *Mostyn* v. *West Mostyn Coal and Iron Co.* (4)

It is unnecessary for me to decide that there was on the part of the defendants any fraud, even in the sense in which that word is sometimes used in Courts of Equity, but the defendants concealed, for they did not divulge, a fact known only to themselves which was material to the value of the property, and in the circumstances it would, I think, to use the language of James L.J. in *Torrance* v. *Bolton* (5), be unconscientious for the defendants to insist upon availing themselves of any legal advantages they may have obtained by the contract, and in particular the retention of the deposit.

I must follow *Stevens* v. *Adamson* (6), and order the return of the deposit with interest. I also order the defendants to pay the plaintiff's costs of investigating the title as well as the costs of the action.

Solicitors: *Arthur L. Jacobs; E. S. Bristowe.*

(1) (1862) 1 H. & C. 90, 100.
(2) (1815) G. Coop. 308; on appeal (1818) 2 Swans. 287.
(3) (1843) 2 Y. & C. C. C. 542.
(4) (1876) 1 C. P. D. 145, 155.
(5) (1872) L. R. 8 Ch. 118, 124.
(6) 2 Stark. 422.

R. M.

WARRINGTON J.

1905

Dec. 11, 12.

OFFIN *v.* ROCHFORD RURAL DISTRICT COUNCIL.

[1905 O. 188.]

Highway — Roadside Waste — Dedication — Presumption — Evidence — Public Authorities Protection — Action for Declaration of Title — Delay — Continuance of Injury — Cause of Action — Rules of Supreme Court, 1883, *Order xxv., r. 5 — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

Fences by the side of a highway are prima facie the boundaries of the highway so as to raise a presumption that the public right of way extends over the whole space of ground between the fences. But the mere existence of fences on either side of a highway is not conclusive. In order to raise the presumption it must be proved that there is nothing to shew that they were not put up as boundaries of the highway.

The plaintiff claimed that a triangular piece of land abutting on and not fenced off from a highway belonged to him:—

Held that, in the absence of anything to shew the contrary, it must be assumed from the nature and position of the fence surrounding the land that it had been put up as a boundary of the highway; that the presumption therefore arose that the land formed part of the highway; and, on the evidence, that there was nothing to rebut that presumption.

The plaintiff erected a fence round the piece of land. The local authority pulled down the fence and afterwards wrote a letter asserting their claim to the land. More than six months after this letter the plaintiff brought an action against them for a declaration that the land belonged to him and an injunction to restrain them from trespassing on it. By his statement of claim he alleged that the defendants had pulled down his fence; that they claimed that the land formed part of the highway, and that this claim prevented him from selling the land:—

Held, that the assertion of the defendants' claim to the land gave the plaintiff no cause of action, and, therefore, that he could not take advantage of the power given to the Court by the Rules of the Supreme Court, Order xxv., r. 5, to make a merely declaratory judgment; that the only act of the defendants which gave him any cause of action was the pulling down of the fence; that the Public Authorities Protection Act, 1893, applied; the action was brought too late, and must be dismissed with costs as between solicitor and client.

This was an action for a declaration that a triangular piece of land belonged to the plaintiff and that no part thereof formed part of the highway, or was subject to any public right of way

or other right; and for an injunction to restrain the defendants from interfering with any inclosure of the land by the plaintiff and from trespassing for any purpose on the land. The following statement of facts is taken from the judgment of Warrington J.:—

The locus in quo is situate within the rural district of Rochford, in the county of Essex, and the road is an ancient high road, which runs northwards from Rochford past South Fambridge to Fambridge Ferry. The piece of land in question abuts on this road. It is triangular in shape and contains 1600 square yards. From the metalled part of the road to the apex of the triangle is about ninety feet. The land is included in a farm known as the Brick House Farm, until recently the property of the plaintiff, and is for the purpose of this action still to be treated as his.

From a point somewhat south of South Fambridge the road in question runs between fences up to a point just south of Fambridge Hall, where it turns sharply to the left or west. By the side of the metalled part of the road in that part of it, there are strips of roadside waste of varying width, and at the point where the road turns sharply to the west there is a considerable piece of roadside waste as to which there is no dispute, and which is of an area of about 900 square yards. The road continues, after leaving this point, again with strips of roadside waste by its side and with hedges or fences on either side, up to the point where the locus in quo commences, where it again runs approximately south and north. For some distance south of that point, and on the eastern side of the road, there is an ancient hedge with trees growing in it, and when that hedge reaches the southern corner of the piece of land in question it deviates considerably to the right or north-east, bounding the triangular piece of land on the south-east, and it goes on in the same direction past the north-eastern corner of the triangular piece of land until it almost, but not quite, reaches a point which lies to the east of Brick House. At the north-east corner of the triangular piece of land what I may call one branch of the fence turns again sharply to the left. This branch of the fence appears to me from the photograph to be older than that which runs to the north-east, and there are four good-sized elm trees standing in it. It extends for some distance towards the road again, and

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

bounds the piece of land on the north-east; but the latter part of the fence as it gets nearer the road has no trees, or only small trees, in it, at any rate not such large trees as those elms. It there all but joins the metalled surface of the road, and turns slightly to the right, leaving a very small strip between it and the metalled surface until it comes to the corner of the farm buildings, where the metalled surface of the road has no open land by the side of it at all.

With regard to the piece of land in question, it is rough grass. There is said to have been in 1901 a small grip, admittedly very small, running near the boundary of the metalled part of the road, and it is said that between it and the piece of ground there is a small bank of varying height, never more that two feet at the outside, but still sufficient to make the piece of land in question a little higher than the surface of the metalled road. I doubt whether that so called bank is any higher, or more than very slightly higher, than the centre of the crown of the metalled road. It looks to me very much as if the existence of that bank was sufficiently explained by the raising the crown of the road and lowering the sides of it to make gutters for the purpose of carrying off the water; in other words, it looks very much to me as if the whole of the land on which the road was originally constructed was practically of the same level.

There is one other circumstance with regard to the fence which I must mention. Looking at the map it occurred to me that possibly the road in this case (unlike most of those which come before the Court) had been made after the close had come into existence, because on the map the line of fence on the south-eastern side of the piece of land is with a slight break projected to the western side of the road, but on inquiry from one of the witnesses who was thoroughly well acquainted with the locality, I was informed that there was no fence on the western side of the road, in the same sense in which there is a fence on the eastern side—that the boundary between the closes on the western side of the road was a mere dyke; and, therefore, I cannot come to the conclusion, which would, of course, be a conclusion in favour of the plaintiff, that the road came into existence upon the surface of an already existing close.

I have stated the facts so far as they seem to me to be material in reference to the physical topographical characteristics of the place in question. Now with regard to the mode in which the piece of land has been used. It has undoubtedly been used for certain purposes by the tenants of Brick House Farm. They have from time to time, and, from the admissions made by Mr. Dickens on behalf of the defendants, I conclude with considerable regularity, used this land for the purpose of placing on it clamps of manure, but those clamps have been placed on that part of it which is nearer to the fence than to the metalled part of the highway. They have also used the land for grazing their cattle and for grazing sheep, but it does not appear that the sheep were ever penned upon it. They and the cattle seem to have been turned out to graze on the piece of land exactly in the same way as they have from time to time been allowed to graze upon the other part of the roadside waste. In addition to that the tenants have from time to time, and, again, I may say with regularity, used the land as a means of passage from the roadway to the gate in its north-eastern corner leading into the field on the south-east side of the piece of land. One instance was given in evidence of the thrashing of a stack of corn upon the land, and the stacking upon it of the resulting straw. Another instance was given of user of the land at a time when some years ago some steam ploughing was in progress in the field to the south-east. It is said that a house on wheels for the accommodation of the men looking after the steam plough stood on this piece of land for some few days.

None of the acts which I have mentioned are inconsistent with the notion that the land was all the time subject to public rights of passage, and, therefore, those acts are not enough to rebut the presumption on which (as I shall mention directly) the defendants rely if that presumption in fact exists. One witness did speak to an act which, if it were really established, would be inconsistent with the exercise by the public of rights of passage over the land. He said that years ago—at all events, before 1859—there stood about six feet back, but near the edge of this piece of land, a line of iron hurdles on wheels, that on the occasion, of which he also spoke, when the thrashing took place

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

on the land, he remembers that some of those hurdles had to be moved back in order to allow the thrashing machine to come on to the land. That witness spoke to a period covered by the knowledge of Mr. Potter, a very intelligent retired farmer, older than the witness in question, who lived in the neighbourhood, and who was called to depose to others of the acts of user to which I have already referred; and I cannot bring myself to believe that if that particular act had really taken place, Mr. Potter would not have known it. Other old witnesses were called, and not one of them deposed to this most crucial fact, if it really did exist. The particular witness who did depose to it, though I do not say for a moment he was not saying what he believed to be the truth, was by no means a witness whose memory I could trust in the absence not only of corroboration, but in the remarkable absence from the other witnesses of any testimony of the same kind, and the conclusion I come to with regard to that particular fact is, that I cannot accept his statement, and I must treat the case as if that alleged fact had not taken place. The result, therefore, is, that so far as the acts of the tenants and owners of the land in question are concerned, there is nothing here which would rebut the presumption to which I have referred, if it in fact exists.

On the other hand, there have been no acts on the part of the public from which it would be possible to infer a dedication of this piece of land as part of the highway, apart from the dedication of the metalled road itself. If, however, the presumption exists, any such separate dedication of the piece of land would, of course, be unnecessary. The dedication of the highway would in that case be sufficient to involve the dedication of this piece of roadside waste.

The plaintiff in the year 1904 erected a fence round the piece of land in question, between it and the high road, and on July 11 in that year the rural district council took away that fence, and thereby, if the plaintiff was right in asserting that the public had no right of passage over it, committed a trespass. On July 23, the plaintiff having complained of what had been done, the rural district council wrote a letter asserting their claim to this piece of land as part of the highway. The writ in this

action was not issued until February 8, 1905, being more than six months after the act of trespass in taking away the fence and after the letter of July 23 asserting their claim to the land.

The action now came on for trial.

Rowden, K.C., and *A. M. Begg*, for the plaintiff. We admit that the metalled part of the road is a public highway, but this piece of land forms no part of that highway. The defendants do not rely on any specific acts of dedication of this land to the public, so they have to shew that dedication must be presumed from acts of user by the public: *Attorney-General* v. *Esher Linoleum Co.* (1); *Spedding* v. *Fitzpatrick.* (2) No doubt there is a presumption that roadside waste lying between the metalled part of the road and the fences forms part of the highway, but that refers to fences which were put up to be the boundaries of the road, not to the fences which happen to be next to the road at an indefinite distance from it. If the presumption exists in this case we are entitled to adduce evidence of acts of user by the plaintiff and his predecessors which rebut that presumption: *Neeld* v. *Hendon Urban Council* (3); *Countess of Belmore* v. *Kent County Council* (4); *Harvey* v. *Truro Rural Council.* (5)

The restriction as to time in the Public Authorities Protection Act, 1893, s. 1 (*a*), does not apply to a claim for a declaration of title. Interference with our inclosure is a "continuance of injury."

Dickens, K.C., and *C. Herbert-Smith*, for the defendants. The presumption that land between the road and the fences forms part of the highway still exists. It has only been qualified by the statement of Channell J. in *Neeld* v. *Hendon Urban Council* (3) that the fences must not be so far from the road that they obviously have no reference to it. Here there is an old fence containing old trees round this piece of land. It obviously must have been put up in order to inclose the highway. The object of inclosing so large a space may have been to ventilate the road, and allow room for traffic at a time when metal was

(1) [1901] 2 Ch. 647.
(2) (1888) 38 Ch. D. 410.
(3) (1899) 81 L. T. 405.
(4) [1901] 1 Ch. 873.
(5) [1903] 2 Ch. 638.

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

not used on roads. We rely on the presumption which arises from this fence rather than upon that which arises from evidence of user of the land as a highway. Lord Russell of Killowen C.J. said in *Neeld* v. *Hendon Urban Council* (1) that the presumption did not exist under all conditions; but that observation was made obiter—the case was decided on the ground that the presumption was rebutted by the evidence. Prima facie when a highway runs between fences, unless there is something to shew the contrary, the public have a right to the whole, and are not confined to the metalled part of it: *Rex* v. *Wright* (2); *Reg.* v. *United Kingdom Electric Telegraph Co.* (3) The doctrine is recognized in *Locke-King* v. *Woking Urban Council* (4), *Friern Barnet Urban Council* v. *Richardson* (5), and *Harvey* v. *Truro Rural Council.* (6)

The presumption, therefore, is that the whole of this piece of land is highway, and we submit that there is no evidence to rebut that presumption. To do so it must be proved that acts of ownership have been done which are inconsistent with the use of the land by the public: *Countess of Belmore* v. *Kent County Council.* (7) No doubt the tenants of Brick House Farm have used the land, but all they have done has been consistent with our rights: *Curtis* v. *Kesteven County Council.* (8)

The Public Authorities Protection Act, 1893, is an answer to this action. It is not a question of the form of relief asked. We pulled down the plaintiff's fence in "pursuance or execution, or intended execution, of an Act of Parliament." That was on July 11, 1904, and was the only thing we did which gave him a cause of action. The letter of July 23 only gave the reasons for the act. The plaintiff did not issue his writ till February 8, 1905, more than six months after both the trespass and the letter. Therefore s. 1 (*a*) applies and the action fails. It cannot be treated as an action for slander of title, for to support that there must be evidence of malice. It has been held that s. 1 of the Act of 1893 applies to an action for a declaration of title:

(1) 81 L. T. 405.
(2) (1832) 3 B. & Ad. 681.
(3) (1862) 31 L. J. (M.C.) 166; 6 L. T. 378.
(4) (1897) 62 J. P. 167.
(5) (1898) 62 J. P. 547.
(6) [1903] 2 Ch. 638.
(7) [1901] 1 Ch. 873.
(8) (1890) 45 Ch. D. 504.

Grand Junction Waterworks Co. v. *Hampton Urban Council.* (1) The Rules of the Supreme Court, Order xxv., r. 5, does not assist the plaintiff, for he has no cause of action on which to ask for a declaration of title.

Rowden, K.C., in reply. There is no evidence from which it can be presumed that this piece of land has ever been dedicated to the public. No acts of user by the public have been proved, and we have proved acts of the plaintiff's predecessors inconsistent with the defendants' contention. The defendants rely entirely on the position of the hedges, but that is not now sufficient to support the presumption: *Countess of Belmore* v. *Kent County Council.* (2) No doubt *Neeld* v. *Hendon Urban Council* (3) turned on a question of a possible boundary of the uninclosed lands of a manor; but the principles there laid down apply to this case, and Lord Russell of Killowen C.J. said that the burden was on the defendants to shew that a highway had been interfered with. Here they have not shewn any ground for the presumption. The defendants cannot be entitled to more of this land than sufficient width for a person to walk on when the road is founderous. In no case has the presumption been held to extend to a fence ninety feet from the metalled part of the road. This fence must have been put up as the boundary of the ploughed land, not as the boundary of the road. No one ever heard of the boundary of a road turning at a right angle as this fence does: in fact, it is not one continuous hedge, but two hedges.

On the question of delay we submit that the Public Authorities Protection Act of 1893 is one which limits the rights of the public, and must be construed strictly. We ask for a declaration of title. We are claiming our title continuously. Pulling down the fence was only an act done as proof of title.

[WARRINGTON J. It was a trespass, and gave you a cause of action. You could not have taken proceedings but for that.]

They are throwing this doubt on our title continuously. We might have proceeded under the Rules of the Supreme Court, Order xxv., r. 5, and asked for a declaration only. Such an action as that would not have been within the Act of 1893 at all.

(1) (1899) 15 Times L. R. 412. (2) [1901] 1 Ch. 873, 877.
(3) 81 L. T. 405.

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

WARRINGTON J. stated the facts, said that there was no evidence on the one hand of acts which would rebut the presumption, nor on the other hand of acts from which dedication of the piece of land could be inferred, and continued:—The real question, therefore, which I have to decide (and in this, as I shall presently point out, the case differs from those cases which were cited to me) is this: Is there a presumption which prima facie supports the defendants' case? What is the presumption on which the defendants rely? It is found expressed in one of the propositions left to the jury by Martin B. in the case of *Reg.* v. *United Kingdom Electric Telegraph Co.* (1) I am taking his statement from the judgment of Crompton J. in the Court of Queen's Bench. He says: "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way prima facie, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers." Crompton J. remarks on this proposition as follows: "That seems to us" (he is delivering the judgment of himself and Blackburn J.) "to be a very proper direction. An objection was made to it in two ways by Mr. O'Malley. It was said that that would apply to cases where there is a highway open to a considerable green sward or land which may be inclosed by the lord of the manor, if connected with the waste, or by the landowner, if it belongs to the landowner, and that the direction to the jury would take in a place of that kind which is really not a part of the highway. But I own it strikes me that my brother Martin guards carefully against that. He speaks of an ordinary highway as running between fences, and he says that prima facie that is to be taken as a highway." Lower down he says: "The proposition"—that is, the proposition of Martin B.—"is confined to the case of an ordinary highway running between fences, though it may be of varying and unequal width. That is the principle of *Rex* v. *Wright* (2), which is a very strong

(1) 31 L. J. (M.C.) 166; 6 L. T. 378. (2) 3 B. & Ad. 681.

case, and the principle is also laid down in several other cases which are referred to in *Rex* v. *Wright*. (1) Taken altogether, I think it comes to this, that, prima facie, when you look at a highway running between fences, unless there is something to shew the contrary, the public have a right to the whole, and are not confined to the metalled part of it." The presumption then applies to the ordinary highway running between fences.

It is said that some doubt is thrown on the existence of the presumption as so stated by *Neeld* v. *Hendon Urban Council* (2), and by the case before Cozens-Hardy J. of *Countess of Belmore* v. *Kent County Council*. (3) Now, is that so? In *Neeld* v. *Hendon Urban Council* (2) the question arose as to a strip of land formerly part of the waste of the manor, and separated from the highway and a strip of green sward by its side, by a ditch of a considerable depth and width.

In both the Court of Queen's Bench and the Court of Appeal it was held that there was ample evidence to rebut the presumption if it existed, and the question whether the presumption existed then remained undecided. Channell J., however, made some extremely valuable observations on the true effect to be given to the observations of Martin B. and of Crompton J. in *Reg.* v. *United Kingdom Electric Telegraph Co.* (4) Commenting on that case he says (5) : " The result of that decision "—that is, the decision in *Reg.* v. *United Kingdom Electric Telegraph Co.* (4) —" seems to me to be that where there is a high road running between two fences at some distance away from the part of the high road that is usually used, a question of fact arises whether those are the fences or boundaries of the high road. If that be so, this decision comes to little or nothing more than that the action of the highway authorities in metalling a particular part of the road does not limit the rights of the public to that part. That is a very clear proposition, and it is by no means clear that on this question the judges ever intended to go beyond that point." He then states the circumstances which in various cases have determined the position of the fences, and then he goes on to

(1) 3 B. & Ad. 681.
(2) 81 L. T. 405.
(3) [1901] 1 Ch. 873.
(4) 31 L. J. (M.C.) 166; 6 L. T. 378.
(5) 81 L. T. 406, 407.

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

say this: "Of course it is a question of degree in each case whether or not there is a substantial piece of waste, and then comes the question whether the fences between the inclosed land and the waste were put up with any reference to the highway or whether they were put where they are for some other reason. I am inclined to think that in each case that question ought to be decided before any question of presumption with regard to the space which in fact may be found to exist between the fences. Of course the inclosing from the waste may have been with reference to the highway in the way that I have mentioned. It is perfectly possible. When a highway runs through a large piece of waste, and portions of the waste are inclosed with the consent of the lord of the manor, it may be that the very reason why so much is inclosed and not more is the existence of the highway and the doctrine I have referred to. Consequently, it seems to me that, before considering the question of presumption, you must first consider whether the fences in existence were put up in reference to the highway, and are fences or boundaries of the high road in the sense in which Crompton J. used the expression in *Reg.* v. *United Kingdom Electric Telegraph Co.* (1), or whether they are simply boundaries separating the inclosed land from the waste." He then considers the facts and circumstances relating to the condition and situation of the land and fences, including the fact that the land was waste of the manor; and he ultimately comes to the conclusion that on this point, if he were deciding the case in 1874—that is, before certain facts to which he afterwards alludes as rebutting the presumption had taken place—he would have great doubt: but he went on to state that in and since 1874 there were acts of ownership and other circumstances which would be sufficient to rebut the presumption if it existed, and on that ground he decided against the claim of the urban district council.

In the Court of Appeal there are certain expressions in the judgment of the Lord Chief Justice which were much relied upon by the plaintiff. He said (2): "Their suggestion"—that is, of the defendants the urban district council—"is that because the road has hedges on either side the whole space

(1) 31 L. J. (M.C.) 166; 6 L. T. 378. (2) 81 L. T. 409.

between those hedges is part of the highway, and in support of that argument they relied upon the case of *Reg.* v. *United Kingdom Electric Telegraph Co.* (1) I confess that I think there is a great deal to be said in support of the remarks of Channell J. upon that case and the other cases cited to him. It seems to me very difficult to give assent to such a general proposition as this, that under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. The question whether such a space is all highway would depend, to a great extent, I think, on many other circumstances, such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the conditions of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway." He then goes on to say it is not necessary to pursue that subject further, because he comes to the conclusion (agreeing with Channell J.) that there was ample evidence to rebut the presumption, even if it existed; and, therefore, there is no decision on that point.

A. L. Smith L.J. cites the proposition as stated by Crompton J., which I have already read, and accepts that as a correct statement of the law, making no further remark upon it, but only going on to state that he thinks the presumption is rebutted. Vaughan Williams L.J. says this (2): "I entirely agree that if any presumption could be made from any of the facts as to this piece of land forming part of the highway, it is amply rebutted by the evidence before the Court. But I wish to add one word with regard to the applicability of the presumption to a case where a road goes across the uninclosed waste of a manor. The presumption is"—and now he states the presumption—"that prima facie, if there is nothing to the contrary, the

(1) 31 L. J. (M.C.) 166; 6 L. T. 378. (2) 81 L. T. 410.

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

public right of way extends over the whole space of ground between the fences on either side of the road; that is to say that the fences may prima facie be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated. But in the case of the waste of a manor there is another obvious reason for which fences may be put up, namely, to separate the adjoining closes from the waste. I therefore doubt if any presumption can be said to arise in the case of a road going across the uninclosed waste of a manor." I have not to deal with waste of a manor, and, therefore, that part of Vaughan Williams L.J.'s judgment does not assist me. But I think that the alternative way in which he states the presumption where it does exist is of great assistance. I mean this,—that the fences which are found on either side of a highway "may prima facie be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated."

It seems to me that the result both of that case and of *Reg.* v. *United Kingdom Electric Telegraph Co.* (1) is this—that the mere existence of fences on either side of a highway is not enough to raise the presumption. You have to find whether those fences are prima facie to be taken to have been made in reference to the highway, and, therefore, to be the boundaries of the highway, and, further, I think that, having regard to the judgment of Vaughan Williams L.J., if you find a fence by the side of the highway, then prima facie that fence is the boundary of the highway, unless you can find some reason for supposing that it was put up for a different purpose.

In the case of *Countess of Belmore* v. *Kent County Council* (2) the learned judge again—as in *Neeld* v. *Hendon Urban Council* (3)—came to the conclusion that there were acts of ownership on the part of the owners of the land in question which were inconsistent with public rights, and would therefore rebut the presumption relied upon by the defendants. With regard to the presumption, what he said was this (4): "The defendants, however, assert that there is a presumption of dedication to the

(1) 31 L. J. (M.C.) 166; 6 L. T. 378.
(2) [1901] 1 Ch. 873.
(3) 81 L. T. 405.
(4) [1901] 1 Ch. 877.

public quite up to the ancient fence, and that there is no justification for limiting the dedication to that portion of the high road which is metalled, even though highway rights have not been exercised beyond the metalled roadway. On this point I have derived assistance from the judgments of Channell J. and of the Court of Appeal in *Neeld* v. *Hendon Urban Council*" (1); and he cites that part of the judgment of the Lord Chief Justice which I have read. He then says: "Now, applying the principles laid down by the late Lord Chief Justice, I think there is no presumption of dedication up to the old fence, or that, if there is any such presumption, it is rebutted by the surrounding circumstances and by the evidence." It is to be noticed that he does not state the facts on which he comes to the conclusion that there is no presumption—that is to say, the facts relating to the condition and circumstances of the road. It was not necessary for him to do it, because the acts of ownership in that case were sufficient to justify his judgment without going into the question as to the existence of the presumption. That case, therefore, does not help me much.

Applying the principles I have mentioned, am I to say that in this case the fence bounding the triangular piece of land is to be taken prima facie to have been made in reference to the highway? Now I go back to the facts I have already stated as to the road. The boundaries of the road are irregular. There are throughout strips of waste by the side of it, in one place a strip of waste of considerable size, 900 square yards, and in this case there are 1600 square yards. The fence on the south-eastern side of this land is continuous with the fence bounding the road further to the south. On the other hand, the size of the land in question is considerable, and further, the line of the fence continues beyond its north-eastern boundary, and there is the return fence from the north-eastern corner towards the west. But the difficulty I have, looking to the line of the fence as it runs from the south towards the north and north-east, is to find any conceivable explanation for the construction of the fence in the line which it now takes unless in ancient days, when it was made, it was intended to divide the close to the east from the

(1) 81 L. T. 405.

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

high road. So far as I can see there is no difference—and I have not been told that there is any difference—in the nature of the land to the west of the fence from that to the east of the fence. What the explanation may be, of course it is impossible to say. It has occurred to me, but that is a pure theory, as possible that the boundary of the highway in ancient times ran past the farm and formed the line of the highway again further to the north, so that the buildings of the farm now stand on what at some time or another may possibly have been part of the highway, but that is mere conjecture. All I can say is that seeing the existing line of the fence, finding it impossible to discover any theory which would account for the fence taking the line it does and not passing much further to the west, except that it was made as a boundary to the highway, it seems to me I must come to the conclusion that the fence in this case was put up as a boundary of the ancient highway, or put up in reference to the ancient highway, and that therefore the land to the west side of it between it and the metalled road is as much part of the highway as the metalled road itself. On the merits, therefore, I come to the conclusion that the defendants are right.

But if my decision had been against them on that point, I think I must have decided in their favour on the point raised by them under the Public Authorities Protection Act of 1893. The Public Authorities Protection Act, 1893, enacts by s. 1: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof." Now what is, in this case, the act complained of? In my opinion the only act complained of by the plaintiff within the meaning of the statute is the removal of the fence. The statement of claim, in

paragraph 5, alleges the erection by the plaintiff of the fence, and then states: "Defendants by their agents thereupon complained of the inclosure and demanded the removal of the said fence, and after some correspondence the defendants by their agents in or about the month of July, 1904, wrongfully entered upon the said triangular piece of land and broke down and removed the fence. They alleged and still pretend that the said piece of land, or some part thereof, is roadside waste and forms part of the highway, and that the said fence was an encroachment on the highway, and they refuse to reinstate such fence or to allow the same to be restored." Paragraph 6 states: "The plaintiff has since completed the sale to the said Edward Thomson of the part of the said farm agreed to be sold to him as aforesaid with the exception of the said triangular piece of land, and he is desirous of also completing the sale of such last-mentioned land, but is prevented or impeded by the assertion of the defendants that the same or some part thereof forms part of the highway and by their interference with the inclosure thereof." And then the plaintiff claims: "(1.) A declaration that the said triangular piece of land is land of the plaintiff, and that no part thereof forms part of the highway leading from Rochford to Fambridge Ferry or is subject to any public right of way or other right. (2.) An injunction to restrain the defendants, their servants and agents, from interfering with any inclosure of the said land by the plaintiff or any person or persons authorized by him and from trespassing for any purpose on such land."

What is the cause of action alleged there? In my opinion, the trespass in breaking the fence, and nothing else. The assertion by them of their right to the land as part of the highway is not, of itself, a cause of action, notwithstanding that the plaintiff says that he is impeded in his desire to sell the land by the assertion of that right. The only act of the defendants which gave any legal right or cause of action at all to the plaintiff was the pulling down and destruction of the fence. That being so, in my judgment the Public Authorities Protection Act clearly applies. At one time I thought it was possible that the plaintiff might be helped by the Rules of the Supreme Court, Order xxv., r. 5, which enables the Court to make a declaration without

WARRINGTON J.
1905
OFFIN v. ROCHFORD RURAL COUNCIL.

giving any specific relief; but, on consideration, I do not think that is so. I think that, in order to justify an action there must still, as before that rule, be some cause of action; and all that the rule means is, that if there is a cause of action the plaintiff may ask, and the Court may award, merely a declaration asserting his right without awarding damages or an injunction or any other form of specific relief. But in order to justify an action there must be still, as before the rule, a cause of action.

The result, therefore, is, that even if I were wrong upon the merits, in my opinion the action is barred by the Public Authorities Protection Act, and on that ground also the action fails.

It follows, therefore, that there must be judgment for the defendants with costs of the action. I have no discretion in the matter of costs, because by the Act it is provided that: "Wherever in any such action"—such an action, that is, as the present—"a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." There must, therefore, be judgment for the defendants with costs, and those costs must be as between solicitor and client.

Solicitors: *Duffield, Bruty & Co.; Kingsford, Dorman & Co., for W. & F. Gregson, Southend.*

H. C. R.

In re No. 9, BOMORE ROAD.

WARRINGTON J.

1906

Jan. 13.

Company—Winding-up—Contract to sell Assets—Leaseholds—Omission to Assign—Dissolution of Company—Appointment of New Trustee—Vesting Order—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 25, *sub-s.* 1, *and s.* 26.

By an assignment of September, 1890, leaseholds became vested in a limited company for the residue of a term of ninety-nine years. In 1896 this company went into voluntary liquidation, and its assets were transferred to a new company; the purchase-money was paid, the new company was let into possession, but by inadvertence no assignment of the leaseholds was executed. The old company having become automatically dissolved under s. 143 of the Companies Act, 1862, a petition was now presented by the new company under the Trustee Act, 1893, asking for the appointment of a named person, pursuant to s. 25, to be a trustee of the leaseholds in the place of the old company, and for a vesting order:—

Held, that as it was clearly expedient to appoint a new trustee, the Court was justified in making the order asked for by the petition.

In re Taylor's Agreement Trusts, [1904] 2 Ch. 737, distinguished.

PETITION.

By a lease of July 25, 1873, certain premises known as No. 9, Bomore Road, in the parish of St. Mary Abbotts, Kensington, were demised to James Akhurst and George Norrish, their executors, administrators, and assigns, for a term of ninety-nine years from June 24, 1873, at the rent and subject to the covenants by the lessees and conditions by and in the said lease reserved and contained.

By an indenture of September 3, 1890, the premises comprised in and demised by this lease were duly assigned to a limited company which had just been formed and registered as Pitt & Norrish, Limited, for the unexpired residue of the said term of ninety-nine years, subject to the payment of the rent and the performance of the covenants and conditions in the said lease.

Early in 1896 resolutions were duly passed for the reconstruction of Pitt & Norrish, Limited, under which the old company was to be wound up voluntarily, and its assets transferred to a new company as soon as it had been incorporated.

By an agreement of February 26, 1896, between the old

WARRINGTON J.
1906
No. 9, Bomore Road, *In re.*

company and its liquidators of the one part and the new company of the other part, it was agreed that the old company and its liquidators should transfer, and the new company should take over, as from January 1, 1896, all and singular the lands, buildings, and other the property of the old company therein described; and that as part of the consideration for such transfer the new company should assume, pay, and discharge all the debts, liabilities and obligations of the old company, and perform and fulfil all contracts and engagements then binding on it, and pay all costs and expenses of and incidental to the winding-up of the old company.

Shortly after the execution of this agreement, the new company was let into possession of the premises comprised in and demised by the lease of July, 1873, and had remained in possession up to the present time, but by some inadvertence no assignment of these premises to the new company had been executed.

On July 9, 1896, a general meeting of the old company was duly held pursuant to s. 142 of the Companies Act, 1862, and on July 15, 1896, the liquidators made the return required by s. 143 of the same Act, and thereupon the old company became automatically dissolved on October 15, 1896.

At the end of 1905, the new company having occasion to deal with these leasehold premises, the fact that they had not been formerly assigned was discovered; and as the old company had long ceased to exist, the present petition was presented by the new company and entitled "In the matter of the trusts affecting hereditaments known as No. 9, Bomore Road, &c., arising under a contract for sale dated February 26, 1896, and made between Pitt & Norrish, Limited (since dissolved) and" its liquidators of the one part, and the new company of the other part, "and in the matter of the Trustee Act, 1893," praying: (1.) for a declaration "that the old company was at and immediately before the date of its dissolution possessed of the then residue of the said term in the said leasehold premises as trustees for the petitioners upon a trust within the meaning of the Trustee Act, 1893." (2.) "That pursuant to s. 25 of the same Act" (a named person) "may be appointed to be a trustee of the said premises in the place of the old company, and that the said premises

may pursuant to s. 26 of the same Act be ordered to vest in " (the named person) " for all the residue of the said term or other the estate or interest then vested in the old company immediately before the dissolution upon the trusts upon which the same were held by the old company as aforesaid."

This petition was not served upon any person.

J. G. Wood, for the petitioner. There has been a recent conflict of authority, as to the power to appoint a new trustee and make a vesting order in cases of this kind, but in 1880, in a case on all fours with the present, except that the land was freehold, Malins V.-C., on my application, made an order precisely similar to the one now asked for. (1) In *King of Hanover* v. *Bank of England* (2), where stock was standing in the name of a corporate body which had ceased to exist, the Court appointed trustees, and directed them to transfer the fund. In *In re General Accident Assurance Corporation, Ld.* (3), a similar case to the present, Farwell J. was asked to make, and did make, a vesting order, on the footing that the premises had been vested in a trustee who could not be found. This case was not followed by Buckley J. in *In re Taylor's Agreement Trusts* (4), but that case is distinguishable on the ground that the subject-matter was a patent, which, having been granted to a patentee who had ceased to exist, might fairly be considered to have disappeared altogether. This case was brought to the notice of Farwell J. in *In re Richard Mills & Co. (Brierly Hill), Ld.* (5), when he followed *In re General Accident Assurance Corporation, Ld.* (3)

King of Hanover v. *Bank of England* (2) does not appear to

(1) Reg. Lib. A. 1880, 2297.
Malins V.-C., November 19, 1880.
In re Trusts of Land at Farnborough, and *In re* The Trustee Act, 1850, and Trustee Act, 1852.
Petition of Knell.
Court appointed John Matthew Chamberlain of, &c., trustee of the two several pieces of land situate, &c., in place of the Farnborough, &c., Society, Limited.
And Orders that the said lands do vest in the said J. M. Chamberlain for all the estate which upon the execution of the said Indenture of the 12th July, 1874, remained vested in the Farnborough, &c., Society, Limited, upon trust for the petitioner, his heirs and assigns.

(2) (1869) L. R. 8 Eq. 350.
(3) [1904] 1 Ch. 147.
(4) [1904] 2 Ch. 737.
(5) [1905] W. N. 36.

WARRINGTON J.
1906
No. 9, Bomore Road, *In re.*

have been cited in either of those cases. Sect. 25 is in perfectly general terms; it is "expedient" in this case to appoint a new trustee, and then to make an order vesting in him the legal estate in the manner asked for by the prayer of this petition. There is no need to serve the Crown in this case; even if the estate is vested in the Crown no beneficial interest passes.

Warrington J., after shortly stating the facts, continued:— The difficulty that arises is in consequence of some conflict of authority, which I propose to consider. In *King of Hanover* v. *Bank of England* (1) a large sum of consols stood in the name of the Lords of His Majesty's Royal Regency of Hanover, and it appeared that on the taking over of the kingdom of Hanover by Prussia, the body described in the report of the case as the corporation or quasi-corporation known as The Lords of His Majesty's Royal Regency of Hanover ceased to exist, and it became necessary, as in this case, to do something to make a title to those consols; and ultimately James V.-C. made an order under the section of the old Trustee Act, corresponding to the 25th section of the Act of 1893, which order is set out at p. 352 of the report. It was, so far as is material, in these terms: It declared that the body or persons described in the Bank books as the Lords of His Majesty's Royal Regency of Hanover were trustees of the 600,000*l.* odd Bank annuities mentioned in the pleadings for the persons entitled thereto under the formal letter of November 19, 1836, in the bill mentioned, "and it appearing that it is expedient to appoint new trustees of the said sum of Bank annuities, and that such appointment cannot be made except by the order of this Court," trustees were appointed and a vesting order was made.

The next case is an unreported case, the note of which in the Record Office Mr. Wood has been kind enough to give me (2), in which a similar order was made by Malins V.-C. That was a case relating to real estate, and I am told that the facts were for all practical purposes identical with the present. The estate had been vested in a company; the company was dissolved, and Malins V.-C. made an order appointing a new trustee, as I am

(1) L. R. 8 Eq. 350. (2) See note (1), p. 361.

asked to do in this case, and on that appointment making a vesting order in that new trustee. Then later on, in the year 1903, Farwell J., in a case of *In re General Accident Assurance Corporation, Ld.* (1), had to deal with a case exactly on all fours with that with which I have now to deal, in which a mortgage of leaseholds had been vested in a dissolved company, and it was necessary to vest that mortgage in a purchaser from the dissolved company. In that case Farwell J. was not asked to appoint new trustees; he was asked to act under ss. 26 and 35 of the new Trustee Act, and to make a vesting order as on the footing that the premises had been vested in a trustee who could not be found. He thought it right to make the order. In a subsequent case of *In re Richard Mills & Co. (Brierly Hill), Ld.* (2), Farwell J. made a similar order under s. 26 of the Act of 1893.

So far the authorities seem to me to authorize me to do what I am prepared to do, and I should have no hesitation at all except for the decision of Buckley J. in *In re Taylor's Agreement Trusts.* (3) I think I need say very little about that case, because the subject-matter was a different subject-matter to that with which I have to deal. In that case the judge was dealing with a patent, and I think his decision is determined largely by the fact that he was dealing with letters patent granted by the Crown to a patentee who had ceased to exist, and consequently the letters patent might be said to have merged and to have disappeared altogether. He did deal in a few words with that 25th section on which I am asked to act, but I think in his dealing with that section his judgment was directed, as was natural, mainly to the facts with which he had to deal—namely, that the subject-matter in the case before him was letters patent.

Now, turning to s. 25, the form of order mentioned in s. 25 is in perfectly general terms. It empowers the Court whenever it is expedient to appoint a new trustee, and if it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, to make an order for the appointment of a new trustee or

(1) [1904] 1 Ch 147. (2) [1905] W. N. 36.
(3) [1904] 2 Ch. 737.

WARRINGTON J.

1906

No 9, Bomore Road, *In re.*

new trustees. Now, is it expedient in this case to appoint a new trustee? There can be no doubt about that. Here is a property vested in a purchaser in equity with a legal estate outstanding: nobody knows where that legal estate is: and except by appointing a new trustee it is impossible to get that estate vested where it ought to be—namely, in the purchaser or a nominee of the purchaser. That being so, the section enables the Court to do that which it is expedient to do where it cannot, as in the present case, be done without the assistance of the Court. Then it merely adds these words, "although there is no existing trustee"—words not limiting in any way the powers given to the Court by the previous part of the section or making it incumbent upon persons, who apply to the Court to exercise its power, to shew that there is no existing trustee. The words merely prevent any limitation of the general power in the earlier part of the section in a case in which it is shewn that there is no existing trustee. I think therefore that I am justified in appointing and that this is a case where it is expedient to appoint a new trustee; and if I appoint a new trustee, there is no question that I may make the vesting order. The order will be made in the terms of the prayer of this petition.

It seems to me to be a mere idle form to give the Crown notice that this order has been made. I therefore make this order without imposing on the petitioner the necessity of giving notice to the Crown.

Solicitors: *Edell & Gordon.*

W. C. D.

In re GLASDIR COPPER MINES, LIMITED. ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.

[1901 G. 116.]

C. A. 1905 JOYCE J. *March* 9, 21. C. A. *Nov.* 24, 27, 30.

Limited Company—Debenture-holders' Action—Receiver and Manager—Preservation of Assets—Orders giving Receiver and Manager leave to borrow and create First Charge on Assets—Loans by Plaintiff—Contract by Receiver and Manager—Principal or Agent—First Charges by Deed—Realization — Insufficient Assets — Receiver's Remuneration — Costs of Preservation and Realization—Priorities—Form of Borrowing and Charging Order.

Where advances for the preservation of a limited company's assets are made to a receiver and manager by a party to a debenture-holders' action under an order of Court which directs that the sums advanced shall be a first charge on the assets in priority to the debenture-holders, the receiver and manager is nevertheless entitled to take his costs and expenses properly incurred out of the assets in priority to the sums advanced, if it appears that the true bargain was that the assets should be realized by the receiver and manager for the benefit of all concerned: *Strapp* v. *Bull, Sons & Co.*, [1895] 2 Ch. 1.

But whether the same rule applies where the person making the advance is a stranger to the action, *quære.*

An order was made in a debenture-holders' action against a mining company appointing a receiver and manager. Successive orders were then made on the application of the plaintiffs giving the receiver and manager liberty to borrow, on the security of first charges to be created by him, certain sums of money for the purpose of preserving the company's property and carrying on the business. The receiver and manager borrowed the money from the plaintiffs themselves on the security of deeds executed by him and creating first charges in their favour on the property of the company comprised in the debentures. By each of those charges the receiver and manager expressly stipulated that he should not be personally liable to repay the sums advanced out of his own moneys; but he made no express reservation of his right to be indemnified out of the assets in respect of his costs and expenses properly incurred. He then continued to carry on the company's business, but it proved a failure, and he eventually realized the assets, but the proceeds were insufficient to satisfy both his costs and expenses (including his remuneration allowed by the Court) and also the plaintiffs' charges:—

Held by the Court of Appeal (affirming Joyce J.) that, inasmuch as, in the circumstances, the receiver and manager had acted in the preservation and realization of the assets for the benefit of everyone concerned,

C. A.

1905

GLASDIR COPPER MINES, LIMITED, *In re.*

ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.

he was entitled to indemnity out of the assets in priority to the plaintiffs and all other persons for whose benefit he had so acted.

Strapp v. *Bull, Sons & Co.*, discussed and distinguished.

Per Vaughan Williams L.J.: A receiver and manager, although appointed by the Court, and for the benefit of the debenture-holders, is not the agent to contract, either of the Court or of anybody else, but is a principal.

An order in a debenture-holders' action giving the receiver liberty to borrow money for the preservation of the property comprised in the debentures, and to charge the same on the property, should expressly state whether the charge is to be subject to or free from the receiver's right to indemnity.

THIS action was instituted by the plaintiffs on behalf of themselves and all other debenture-holders of the defendant company, a limited company incorporated under the Companies Acts for working a leasehold mine, to enforce the charge created by the debentures. The debentures, on which a total sum of 26,250*l.* was now due for principal and interest, created a "first charge" pari passu upon the company's "undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital."

The conditions of each debenture provided that "such charge is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures"; also that the principal moneys thereby secured should immediately become payable if (among other events) the company made default for a period of three calendar months in the payment of any interest thereby secured, and the registered holder thereof, before such interest was paid, by notice in writing to the company, called in such principal moneys.

On February 8, 1901, an order was made in the action appointing Charles Smith Nicholson receiver and manager in the usual form. On March 30, 1901, judgment was pronounced directing the usual accounts and inquiries.

On July 3, 1901, upon the application of the plaintiffs, an order was made that Nicholson should be at liberty to borrow not exceeding 500*l.*, at interest not exceeding 5 per cent. per annum, "for the purposes of preserving the property of the defendant company comprised in or charged by the security created by the debentures issued by the defendant company, the

moneys so borrowed to be a first charge on such property." That order was made upon affidavits by Nicholson that he had employed the defendant company's existing mine manager and a staff of men for the purpose of keeping the company's mine free from water and maintaining the works, and that he had already disbursed in advance various sums for the mine manager's salary and for the workmen, also for the salary of an analyst.

Nicholson thereupon borrowed from the plaintiffs a sum of 107*l.* 7*s.*, for which sum he executed a deed dated August 20, 1901, whereby, after reciting the above order and the agreement for the loan, it was witnessed that the 107*l.* 7*s.*, together with interest at 5 per cent. per annum, "shall be a first charge upon the property comprised in or charged by the security created by the said debentures, but that the receiver shall not be personally liable to repay the said sum out of his own moneys." And the receiver thereby agreed with the plaintiffs that he would at all times thereafter execute and do all such assurances and acts as should be reasonably required for effectually vesting the property thereby charged in the plaintiffs and their assigns as security for the said sum of 107*l.* 7*s.* and interest.

By a memorandum dated September 3, 1901, supplemental to the last-mentioned deed, and under Nicholson's hand and seal, it was witnessed that, the plaintiffs having lent to Nicholson the sum of 392*l.* 13*s.* in addition to the above-mentioned sum of 107*l.* 7*s.*, the two sums, amounting to the 500*l.* which he, Nicholson, had been authorized to borrow as a first charge, together with interest at 5 per cent. per annum, "shall be a first charge upon the above-mentioned property," and that the provisions of the previous deed should apply to the further loan.

On September 10, 1901, an order was made, upon the application of the plaintiffs, and with the consent of other debenture-holders in the defendant company, that Nicholson should be at liberty, at an expense not exceeding 200*l.*, to employ an engineer and mining captain to superintend the working of the defendants' mine for five weeks with a view to the preparation of a report to be used in procuring a purchaser for the

C. A. 1905

GLASDIR COPPER MINES, LIMITED, *In re.* ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.

mine, and should be at liberty to borrow such sum of 200*l.* at interest not exceeding 5 per cent. per annum, "and to be (subject to the 500*l.* already borrowed) a first charge upon the assets and property of the defendants" comprised in the debentures. The application for that order was supported by an affidavit by Nicholson stating that since the order of July 3, 1901, the defendants' mine had been preserved by him and the necessary labour had been employed for that purpose; also that the plaintiffs proposed that the mine should, if possible, be sold, or the defendant company reconstructed, and that, therefore, it was necessary that the mine should be worked with a view to the actual production of copper under the supervision of a competent engineer assisted by a mining captain. Nicholson accordingly borrowed the 200*l.* from the plaintiffs, and by a deed of September 11, 1901, after reciting the last-mentioned order, it was witnessed that the 200*l.*, together with interest at 5 per cent. per annum, "shall be a first charge upon the property comprised in or charged by the security created by the said debentures, subject to the 500*l.* already borrowed by the receiver" on the security of the above-mentioned deed and memorandum of charge.

On February 5, 1903, an order was made, upon the application of the plaintiffs, that the receiver should be at liberty to borrow a sum not exceeding 200*l.* "upon the security of a charge (*sic*) upon the assets of the defendant company, subject to the charges already executed by the receiver" in pursuance of the two previous orders, "for the purpose of the payment of expenses for keeping the mine free from water, payment of rent to the lessors, and for the maintenance of the mine."

This further sum of 200*l.* the receiver, Nicholson, borrowed from the plaintiffs, and by a deed dated March 30, 1903, after reciting the last-mentioned order, it was witnessed that the said sum of 200*l.*, together with interest at 5 per cent. per annum, "shall be a charge upon the property comprised in" the debentures, subject to the charge of 500*l.* and interest created by the indenture and memorandum of charge dated respectively August 20, 1901, and September 3, 1901, and subject also to the said charge of 200*l.* created by the said indenture of September 11, 1901.

On August 6, 1903, an order was made, upon the application of the plaintiffs, that Nicholson should be at liberty to borrow a further sum not exceeding 100*l.* "in priority to the debenture-holders," at interest not exceeding 5 per cent. per annum, upon the security of "a charge" upon the assets of the defendant company, subject to the charges already executed, "for the payment of expenses for keeping the mine free from water, payment of rent to the lessors, and for the maintenance of the same."

The application for that order was supported by an affidavit of Nicholson verifying an account shewing his receipts and payments under the previous orders.

In pursuance of that order Nicholson borrowed a further sum of 100*l.* from the plaintiffs, and by an indenture dated September 30, 1903, and executed by Nicholson to the plaintiffs, after reciting that order, it was witnessed that such sum of 100*l.*, together with interest at 5 per cent. per annum, "shall be a first charge upon the property comprised in the debentures, subject to" the above-mentioned previous charges. Each of the deeds of charge of September 11, 1901, March 30, 1903, and September 30, 1903, contained the same restriction of the receiver's personal liability and the same agreement for further assurance as were contained in the deed of August 20, 1901.

All attempts at a sale of the defendant company's property or at a reconstruction failed, a winding-up petition had been presented, the company's lease was forfeited, and the only assets which the receiver was finally able to realize were certain mining fixtures and plant, which were sold. (1) The receiver and manager had been continued from time to time under orders made upon the application of the plaintiffs themselves.

There not being sufficient moneys in the hands of the receiver, after paying the expenses of receivership and management, to satisfy the plaintiffs' charges, they on April 29, 1904, took out a summons asking that he might be ordered personally to repay, with interest, the total sum of 1000*l.* lent by them to him upon the charges under the four orders above mentioned. After that summons was issued, and while it was

(1) See [1904] 1 Ch. 819.

C. A. 1905

GLASDIR COPPER MINES, LIMITED, *In re.* ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES. LIMITED.

still pending, the receiver's accounts were taken in chambers, with the result that on July 14, 1904, the master made his certificate finding that the receiver's total receipts amounted to 2704*l.* 8*s.* 5*d.*, and his payments and allowances in respect thereof to 3072*l.* 17*s.* 2*d.*, leaving a balance due to him of 368*l.* 8*s.* 9*d.*, which included a sum of 350*l.* allowed to him for his remuneration and a further sum of 18*l.* 2*s.* 6*d.* for his costs of passing his accounts. The accounts had been taken in the presence of the plaintiffs, and without any objection on their part being then made to the master's findings.

The summons was then heard by Joyce J., on March 9, 1905. The substantial question argued was whether the receiver and manager had a right to indemnity out of the assets for his costs and expenses, including remuneration, in priority to the plaintiffs' loans.

Younger, *K.C.*, and *Martelli*, for the plaintiffs.

Hughes, *K.C.*, and *A. Adams*, for the receiver and manager, contended that he was entitled to priority for his costs and expenses. They relied upon, among other authorities, *Strapp* v. *Bull, Sons & Co.* (1)

Younger, *K.C.*, in reply.

Cur. adv. vult.

March 21. JOYCE J., after stating the facts down to the issue of the summons, proceeded:—After that summons was issued the receiver's accounts were taken in chambers. I cannot understand exactly what happened in chambers, though I have the notes, but before the application was really dealt with, the receiver's accounts were brought in and taken in chambers, and, as I understand, taken in the presence of the plaintiffs; and further, as I understand, they were taken without any objection on the part of the plaintiffs. The result of taking those accounts is, if it were binding, that there are no assets in the hands of the receiver and manager, and in fact that a further sum is due. At the time of the loans the property comprised in the debentures was subject to the proceedings in the action, and was in the hands of the receiver and manager appointed at the instance

(1) [1895] 2 Ch. 1.

of the plaintiffs, and the receiver and manager was continued from time to time on the application of the plaintiffs. No objection was made to the application of the sums received by the receiver and manager in payment of the expenses of the management and receivership, nor was it ever contended, I think, that the sums received by him should not be so applied, so far as might be necessary. On a consideration of this case, which is a very important one, I am of opinion that, in the circumstances, the expenses of the receiver and manager come before the charges of the plaintiffs in respect of their loans. I think that these loans are in effect first charges, not upon the first and every sum of money got in by the receiver and manager after the dates of the respective advances, but upon the ultimate net results of the receivership and management, which the plaintiffs could, of course, have applied to put an end to at any time. I have not to deal with the case of a stranger advancing money without knowledge or notice of the proceedings or of the exact position of the matter, if indeed it be possible for such a case to arise, which I doubt; but, at all events, following—as I think I am following—*Strapp* v. *Bull, Sons & Co.* (1), I am compelled to come to the conclusion, in the circumstances of this case, there being no assets in the hands of the receiver and manager, that this application fails, and must be dismissed against the receiver with costs. I wish to add that I think that in future orders giving a receiver and manager liberty to borrow ought to be in a different form, so as to make his position quite plain.

A second summons taken out by the plaintiffs on July 27, 1905, asking to vary the master's certificate by disallowing certain specified payments by the receiver and manager, was then, without argument, dismissed with costs, one order being made on both summonses.

From that order the plaintiffs appealed. The appeal came on for hearing on November 24, 1905. C. A.

Younger, K.C., and *Martelli*, for the plaintiffs. It is admitted that as regards the moneys borrowed by the receiver under

(1) [1895] 2 Ch. 1.

C. A. 1905

GLASDIR COPPER MINES, LIMITED, *In re.* ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.

the four orders of the Court, the charges given to secure them have priority over the debenture-holders. But the receiver also claims priority for his costs and expenses incurred in the receivership and management, including his allowance for remuneration. He claims that by virtue of his office he became entitled to a first charge for whatever amount might be found due to him on the taking of his account. The learned judge based his decision upon *Strapp* v. *Bull, Sons & Co.* (1) In that case the Court of Appeal, taking a different view of the facts, reversed the decision of Vaughan Williams J. Upon those particular facts it was held that the receivers and managers who had carried on the business of a company were entitled to be paid their expenses out of the assets of the company in priority to persons who had advanced money for carrying on the business, as well as to the debenture-holders.

It is submitted that when in a debenture-holders' action, and in the presence of all persons interested, an order is made authorizing the receiver to borrow money, the intention is that the property of the debenture-holders shall be charged in favour of the lender in priority to everyone else, the only exception being the costs of the realization of the security, which come first. This is in accordance with the decision of Kekewich J. in *Lathom* v. *Greenwich Ferry Co.* (2), in which it was also held that debenture-holders who advanced money in that way to the receiver for the carrying on of a business stood in the same position as if they were strangers to the action, and were entitled to priority over everyone excepting only the costs of realization, i.e., the costs of the actual sale. In such an action the debenture-holders are administering the mortgaged property through the receiver, who is not their agent, but is an officer of the Court. The lender of money in aid of the realization must, it is contended, have priority over everything except the actual costs of realization. And if a debenture-holder advances money for such a purpose he must, unless he has assumed some special position, be taken to have made the advance in his character of debenture-holder. A receiver and manager of the business of a company, appointed by the Court in a debenture-holders' action, is

(1) [1895] 2 Ch. 1. (2) (1895) 72 L. T. 790, 793.

personally liable for the price of goods supplied to him for the purposes of the business, though he is entitled to indemnity out of the assets of the business: *Burt, Boulton & Hayward* v. *Bull.* (1)

[VAUGHAN WILLIAMS L.J. Has not the officer of the Court always a first charge for his expenses and remuneration? The sheriff has always a first charge on the proceeds of sale under an execution.]

A first charge on the property of the person whose property is being administered; but the Court cannot compel a stranger to contribute to the payment of its officer.

[COZENS-HARDY L.J. In *Chinnery* v. *Evans* (2) it was held that a receiver of mortgaged estates appointed by the Court in Ireland under the Act 11 & 12 Geo. 3, c. 10 (Ir.), was an agent of the mortgagor, and that payment by him of the interest prevented the Statute of Limitations from operating as a bar to the remedies of the mortgagee.]

The receiver was held to be an agent for the purposes of that statute. In *Owen & Co.* v. *Cronk* (3) it was held that a receiver appointed by the trustees of a debenture trust deed to carry on the business of a company was a mere agent, and that, in carrying on the business in the name of the company, he did not incur any personal liability.

[VAUGHAN WILLIAMS L.J. referred to *Perry* v. *Oriental Hotels Co.* (4), in which it was held that, as between the company and a mortgagee, the costs of preservation of the property came after the mortgage, though the costs of realization had priority.]

In *Batten* v. *Wedgwood Coal and Iron Co.* (5), in a debenture-holders' action, Pearson J. held that, the mortgaged property having been sold and the purchase-money (which was insufficient) paid into Court, the plaintiffs' costs of realization must be paid first, and that the balance due to the receiver and manager (including his remuneration) and his costs of the suit must be paid next. In that case there had not been any borrowing of money by the receiver.

(1) [1895] 1 Q. B. 276.
(2) (1864) 11 H. L. C. 115.
(3) [1895] 1 Q. B. 265.
(4) (1871) L. R. 12 Eq. 126.
(5) (1884 28 Ch. D. 317.

C. A. 1905 — GLASDIR COPPER MINES, LIMITED, *In re.* ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.

[VAUGHAN WILLIAMS L.J. referred to *Morison* v. *Morison* (1).

STIRLING L.J. referred to *In re New Zealand Midland Ry. Co.* (2) The lenders came into the present action; must they not take it cum onere?]

It is submitted that they need not. The question is one of principle. *Strapp* v. *Bull, Sons & Co.* (3) depended on special circumstances. If an outside lender is not entitled to the priority which the appellants claim, it will be practically impossible in future for a receiver to borrow money for such a purpose as that here.

[They also referred to *Ex parte Izard.* (4)]

It is clear that costs of preservation must be distinguished from costs of realization, which come first: *In re New Zealand Midland Ry. Co.* (2); *Perry* v. *Oriental Hotels Co.* (5); *Ex parte Grissell.* (6)

[VAUGHAN WILLIAMS L.J. referred to Palmer's Company Law, 5th ed. p. 356.]

It must be remembered that the receiver in this case, being a person sui juris, chose to enter into five contracts, by none of which did he stipulate that his personal claims should take priority over the charges. Therefore, it is submitted that it is impossible to read these contracts as subordinating the charges to the claims of the receiver. The attempt here is really to obtain priority for an unsecured debt.

Hughes, K.C., and *A. Adams*, for the receiver. *Strapp* v. *Bull, Sons & Co.* (3) is a complete authority for Joyce J.'s decision. Whether the result would be the same in a case in which the lender was a stranger to the litigation it is not necessary now to decide, for that is not the question here: it is sufficient to say that *Strapp* v. *Bull, Sons & Co.* (3) covers this case. In a debenture-holders' action the receiver is appointed by the Court to act on behalf of all those persons interested in the assets the subject of the action who are before the Court, and as regards his right to indemnity he comes in before them, though not before persons who are not before the Court. Persons who are in fact

(1) (1855) 7 D. M. & G. 214.
(2) [1901] W. N. 105.
(3) [1895] 2 Ch. 1.
(4) (1883) 23 Ch. D. 75.
(5) L. R. 12 Eq. 126.
(6) (1875) 3 Ch. D. 411, 426-7.

before the Court cannot possibly dispute his right to indemnity. In *Strapp* v. *Bull, Sons & Co.* (1) the question as to the receiver's right to indemnity arose where the persons who disputed his right were before the Court, just as in the present case. *Ex parte Grissell* (2) was a case in which the question arose as to the rights of persons who were not before the Court. Now, in the present case the persons making the advance happen to be persons also largely interested in the action as being themselves debenture-holders, and therefore this case cannot be treated in the same way as if the lender had been a stranger. In *In re New Zealand Midland Ry Co.* (3) the law is properly stated. *Lathom* v. *Greenwich Ferry Co.* (4) is distinguishable from *Strapp* v. *Bull, Sons & Co.* (1), for the lenders were strangers to the litigation. If, however, that case is inconsistent with *Strapp* v. *Bull, Sons & Co.* (1) it cannot stand. There is no difference here between the charges as made by the instruments executed by the receiver and the charges as made or directed by the orders: the instruments do not in any way vary or extend the terms of the orders; so that the same considerations apply as in *Strapp* v. *Bull, Sons & Co.* (1) A receiver is in the position of a paid agent of the Court, and therefore it is the duty of the Court to see that he is paid before anyone else: *Morison* v. *Morison.* (5) Moreover, the plaintiffs here are the very persons on whose application the receiver was appointed. It is a general rule that persons coming in to participate in the distribution of the assets of a company must first indemnify the receiver against the expenses incurred by him in preserving those assets for distribution.

Martelli, in reply.

Cur. adv. vult.

Nov. 30. VAUGHAN WILLIAMS L.J. In my opinion, the appeal in this case depends largely upon a right understanding of the decision in the Court of Appeal in *Strapp* v. *Bull, Sons & Co.* (6) Now, in that case there was a debenture-holders' action brought by W. Strapp, a debenture-holder, on behalf of himself and all

(1) [1895] 2 Ch. 1.
(2) 3 Ch. D. 411.
(3) [1901] W. N. 105.
(4) 72 L. T. 790.
(5) 7 D. M. & G. 214, 226.
(6) [1895] 2 Ch. 1; 72 L. T. 514.

C. A.
1905
GLASDIR COPPER MINES, LIMITED, *In re.*
ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.
Vaughan Williams L.J.

other debenture-holders for the payment of their debentures. These debentures had been issued by the defendants, Bull, Sons, & Co., a joint stock company, registered under the Companies Acts, which carried on business as builders and contractors, and the company had issued debentures to a considerable amount which were a first charge upon the undertaking. In that action receivers and managers had been appointed, and on May 13, 1892, shortly after the commencement of the action and the appointment of the receivers and managers, an order was made on a summons issued by the plaintiff that the receivers and managers should be at liberty to raise a sum of 4000*l.* beyond the sum of 1000*l.* which by a previous order they had been empowered to raise as a first charge on the assets of the company in priority to the securities of the debenture-holders of the company. On May 14, 1892, a petition was presented for winding up the company, and on June 1, 1892, an order was made by consent, as well of the petitioners as of the plaintiff in the debenture-holders' action, that the 5000*l.*, which there was liberty to raise under the previous orders in the action, should be a first charge on all the assets in priority to all the debentures; that second debentures should be issued to the unsecured creditors for the principal moneys owing to the unsecured creditors at that date; that the unsecured creditors, or some of them, should advance two-thirds of the above-mentioned sum of 5000*l.*, and that the plaintiff Strapp should advance the remaining one-third, as and when the same was required for carrying on the works. The debentures issued to the unsecured creditors for the principal moneys owing to them were to be in the same form as those issued to Strapp, and to rank pari passu with them. The winding-up petition was ordered to be adjourned for six months. The petitioners were made defendants in the debenture-holders' action, and pending the adjournment it was ordered that the company should contract no further debts and liabilities. The 5000*l.*, to the extent of 4250*l.*, was raised in pursuance of the consent order, 1750*l.* being advanced by Strapp, and 2500*l.* by some of the unsecured creditors; but it does not appear that the receivers entered into any written contract with he lenders, or that there was any conventional security; but I

suppose the sums advanced were, as often is the case, indorsed upon the order giving the liberty to raise the loan. In such cases there is nothing to negative the receiver's prima facie right to indemnity as against debenture-holders as distinguished from strangers. The loans were used for the purpose of carrying out and completing three contracts with the School Board for London, which necessarily involved large outlay and expenditure in respect of wages and materials. The persons by whom materials were supplied brought actions against the receivers and managers personally to recover the price. The receivers and managers claimed to be indemnified in respect of all sums due to them as receivers and managers, and in respect of all liabilities incurred by them in that capacity, out of all the assets of the company, including the sums due from the school board, in priority to the unsecured creditors who claimed in respect of the advances made by them under the consent order; and a motion was made by the receivers and managers claiming priority over the unsecured creditors. The judgment appealed from did not decide the rights of Strapp, but refused a declaration in favour of the receivers and managers so far as it related to the unsecured creditors. That judgment was reversed by the Court of Appeal on the ground that the unsecured creditors had placed themselves in the position of the debenture-holders on whose behalf the pending action had been brought, and that, as against such debenture-holders, the receivers and managers had a right to be indemnified out of the assets in priority to debenture-holders, even though the debenture-holders might have advanced money on a first charge on all the assets in priority to all the debentures.

The present case raises a similar question as to priorities, but there is the important difference in the facts—namely, that in the present case the receiver entered into contracts with the plaintiffs in the debenture action, who advanced sums from time to time to enable the business, the subject of the debentures, to be carried on. [His Lordship then read the order of July 3, 1901, giving the receiver and manager liberty to borrow up to 500*l.* and the first deed of charge dated August 20, 1901, and proceeded :—] The subsequent orders and charges were substantially in the same form, except that each successive charge made the last

C. A. 1905

GLASDIR COPPER MINES, LIMITED, *In re.* ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.

Vaughan Williams L.J.

first charge subject to the prior charges, which were particularly stated in each case.

It was urged before us that the effect of these charges to which the receiver was a party was (notwithstanding the fact that the receiver was to incur no personal liability) to make the receiver personally contract that the plaintiffs, although debenture-holders and plaintiffs in the debenture-holders' action, should have a first charge, and that such first charge entitled the plaintiffs, as lenders, to be paid first out of the sum realized by the sale of the property charged, subject only to the payment of the costs of realization; and it was contended that the effect of this contractual charge took the case outside the decision of the Court of Appeal in *Strapp* v. *Bull, Sons & Co.* (1) Now, I think that the cases of *Owen & Co.* v. *Cronk* (2) and *Burt, Boulton & Hayward* v. *Bull* (3) establish that, when a receiver and manager is appointed by the Court, he accepts the appointment on the terms that he will be personally responsible to the creditors of the business, whilst he will be indemnified out of the estate. And I think that these cases further establish that such a receiver, although appointed for the benefit of the debenture-holders, is not the agent to contract, either of the Court or of anybody else, but is a principal; and, in my opinion, although it is plain that, as between the receiver and the debenture-holders, there is a strong presumption that every contract properly entered into by the receiver appointed by the Court, acting as such, is entered into on the basis that the receiver is entitled to be indemnified out of the assets before the debenture-holders take anything, yet I think that this is a presumption which can be rebutted, and that it could be rebutted by a contract between a receiver and a debenture-holder lending money to the receiver for the purposes of the management and preservation of the estate, where such a contract contained an expressed or implied term that the receiver would postpone his right of indemnity to the right of a lender under such a charge. The question, therefore, is, Do we find such a term in the present charge? I do not think that the employment of the words "first charge" is sufficient to displace the presumption. Nor do I

(1) [1895] 2 Ch. 1. (2) [1895] 1 Q. B. 265.
(3) [1895] 1 Q. B. 276.

think, having regard to the succession of charges in this case, that the express mention of the prior charges operates to exclude the presumption which I have mentioned and the receiver's prima facie right to be indemnified before any one of the debenture-holders, for whose benefit the estate is being managed, preserved, and realized, receives anything, Taking this view, it is not necessary for me to consider whether the plaintiff could have enforced his remedies while the business was being carried on by the receiver. And, moreover, in this case the business had ceased to be carried on at the moment when the question of priorities in this case arose. In my opinion, the appeal should be dismissed, and with costs.

STIRLING L.J. The main argument urged in this Court was that the case was covered by the decision of the Court of Appeal in *Strapp* v. *Bull, Sons & Co.* (1) The circumstances of that case are somewhat complicated, and differ from those in the present case, and, therefore, I think it desirable to examine in the first place what was in fact decided in that action. The action was brought by the plaintiff Strapp, a debenture-holder of the defendant company, on behalf of himself and all other debenture-holders, against the company, seeking the ordinary relief. Receivers and managers were appointed, and orders were made in the action authorizing them to borrow to the extent of 5000*l.* on the security of a first charge on the assets. Subsequently, unsecured creditors of the company presented a petition for winding-up, which was opposed by the debenture-holders. An order was made by consent, dated June 1, 1892, in the matter of the winding-up, by which the petition was adjourned for six months, and it was ordered that the 5000*l.* directed to be raised in the debenture-holders' action and interest thereon should be a "first charge" (for it is agreed on all hands that the word "first" should have been inserted here, on p. 2 of the report) on all the assets in priority to all the debentures; that second debentures should be issued to the unsecured creditors of the company to the amount of their debts; that the unsecured creditors, or some of them, should advance two-thirds of the 5000*l.*, and that the plaintiff Strapp

(1) [1895] 2 Ch. 1.

C. A.
1905
GLASDIR COPPER MINES, LIMITED, *In re.*
ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.
Stirling L.J.

should advance the remaining third, as and when the same should be required for carrying on the works; and that, pending the adjournment of the winding-up petition, the company should contract no further debts and liabilities. Subsequently one of the receivers and managers was replaced by another to represent the unsecured creditors, and unsecured creditors were also added as defendants in the debenture-holders' action. To them advances were made by Strapp and some of the unsecured creditors on the terms of the above order. The property of the company was realized by the receivers and managers, but the result was unfortunate, and the question was raised, on behalf of the unsecured creditors who had made advances, whether they were not entitled to be paid their advances in priority to the costs and expenses properly incurred by the receivers. In the Court of first instance the contention of those who had made the advances prevailed, but the decision was reversed in the Court of Appeal. It was held, first, that the case must be dealt with on the same footing as if the order of June 1, 1892, had been made in a debenture-holders' action brought by a first debenture-holder on behalf of himself and all other debenture-holders of that class against the company and second debenture-holders; and, secondly, that in that state of circumstances the claims of the receivers to their costs must be allowed. It is the decision on the second point which mainly affects the present case, and reasons for it are stated by Lord Halsbury and by Lindley L.J. Lord Halsbury says (1): "I quite agree that one of the things which was intended to be done was that those who had advanced the 5000*l.* should have priority over all the debentures; but I do not concur in the idea that it ever could have been contemplated that those who were to take upon themselves the burthen of management and receivership should be left to speculate on whether or not they would ever get paid anything. It was an essential part of the arrangement that some one should manage this business, and it was necessarily implied in that arrangement that those who for the benefit of all concerned, and not merely for themselves, were entering into this arrangement, and were

(1) [1895] 2 Ch. 6.

carrying it on to its completion, so that there should be an ultimate resulting fund capable of being divided, should themselves be indemnified for whatever they were doing, namely, carrying on these contracts; and if you look, not at each order separately by itself, but at the whole of the orders, as one arrangement to which all were parties, and all tending to the same thing, it seems to me really to be free from doubt that that was the real meaning of the transaction."

Then Lindley L.J. says (1), referring to the decision of the Court below: "The learned judge, who had to construe these orders to which I have referred, has construed them as leaving the persons who advanced this 5000*l.* in the position of strangers. I think that that is not their true position. Of course, no one dreamt when this arrangement was made that everything would go wrong, and that there would be a deficiency of assets so serious that there is not even enough to indemnify the receivers and managers what they have expended. They did not dream of that for a moment. If they had, no one would have advanced 5000*l.*, or anything. It was hoped that affairs would have turned out better; it was hoped that there would be something coming to the persons who advanced the 5000*l.* which was in the nature of salvage, and it was hoped that there would be something for the first debenture-holders and for the others. Instead of that things seem to have gone wrong. Why, I do not know. There is not enough to reimburse the receivers and managers what they have paid. Now, I cannot agree in thinking that Vaughan Williams J.'s view is correct, that on the true construction of these orders the receivers and managers are to lose everything, and are to have no indemnity at all in respect of any liabilities they may have incurred, assuming that they have incurred them properly, and that they come in respect of their indemnity after those for whose benefit they were working. It cannot be that they are to be regarded as not having anything more to do with the action than outside creditors. That is not their position at all."

It is to be observed that the case dealt with by the Court of Appeal was that of the unsecured creditors of the company who

(1) [1895] 2 Ch. 8.

C. A.
1905
GLASDIR COPPER MINES, LIMITED, *In re.*
ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.
Stirling L.J.

made advances; but Strapp, the plaintiff in the action, also made advances; and in the Court of first instance reference was made to his position. (1) The learned judge, though he gave no final decision on the point, appears to have thought that there was great difficulty in holding that Strapp was entitled to priority over the receivers and managers; and, regard being had to the decision of the Court of Appeal, it is clear that he was in no better position than the second debenture-holders who were postponed to the receivers and managers. The case, therefore, is an authority for the proposition that, where advances are made to a receiver and manager by a party to a debenture-holders' action under an order of Court which directs that the sums advanced shall be a first charge on the assets in priority to the debenture-holders, the receiver and manager is nevertheless entitled to take his costs and expenses properly incurred out of the assets in priority to the sums advanced, if it appears that the true bargain was that the assets should be realized by the receiver and manager for the benefit of all concerned.

In the present case the circumstances are different. There are no second debenture-holders. The orders made by the Court do not themselves create a charge, but simply give liberty to the receiver and manager to borrow on the security of charges to be created by him. The receiver and manager has availed himself of the liberty, and has borrowed from the plaintiffs in the action and has created charges in their favour. By each of those charges he has expressly stipulated that he shall not be personally liable to repay the sums advanced out of his own moneys; but he has not made any express reservation of his right to be indemnified out of the assets in respect of his costs and expenses properly incurred. And it is said that, having regard to the terms of the instruments creating the charges, he cannot claim those costs and expenses in priority to the plaintiffs' advances. The contention is similar to that put forward on behalf of the persons who made the advances in *Strapp* v. *Bull, Sons & Co.* (2) Notwithstanding the terms of the order of June 1, 1892, in that action, the Court examined into the real nature of the transaction; and, in my judgment, the Court ought to do so here and ascertain

(1) See 72 L. T. 517. (2) [1895] 2 Ch. 1.

whether the orders (all of which were made on the plaintiffs' application) and the charges in the plaintiffs' favour were or were not made and given on the basis that the assets should be realized by the receiver for the benefit of all concerned.

It seems to me plain, on the face of these orders themselves, that the advances were made in order that the assets might be better or more advantageously realized by the receiver and manager. Thus the first order authorizes the borrowing "for the purpose of preserving the property of the defendant company"; the second, "to employ an engineer and mining captain to superintend the working of the defendants' mine with a view to the preparation of a report to be used in procuring a purchaser for the said mine"; the third, "for the purpose of the payment of expenses for keeping the mine free from water, payment of rent to the lessors, and for the maintenance of the mine"; and the fourth, "for the payment of expenses for keeping the mine free from water, and for the maintenance of the mine." Though the orders give liberty to create charges by way of security for the sums advanced, I do not think it was contemplated that those securities should be created in such a form as to confer an absolute right on the person making an advance to step in and himself realize the subject-matter of the securities whenever he thought proper. The securities created no personal liability and could not be enforced against the property charged (which was in the hands of an officer of the Court) without the leave of the Court; and it seems to me that the Court would not grant leave, unless a case was made out for putting an end to the management and realization of the property by the receiver. However, no application was made to enforce the securities, and the receiver was allowed to complete the realization of the property, which has turned out disastrously. In my opinion, the orders were made, and the securities given and taken, in the expectation of all parties that by means of the money advanced the receiver would be enabled to realize the property more advantageously—that is to say, in such a way as not only to repay the advances but to pay something to the debenture-holders. Things have turned out very differently; but inasmuch as the receiver, in my view, acted in the realization

C. A. 1905

GLASDIR COPPER MINES, LIMITED, *In re.* ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED.

of the assets for the benefit of every one concerned, I think that he is entitled to indemnity out of the assets in priority to those for whose benefit he was acting. I agree with the decision of Joyce J., and think that the appeal fails.

COZENS-HARDY L.J. Apart from authority, I think there is great force in the argument that when the Court has taken the administration of an undertaking into its own hands by means of an officer appointed to manage the undertaking, and finds it proper to procure money in order that the undertaking may be preserved or carried on to greater advantage with a view to ultimate realization, it can make no difference whether the person who finds the money is an outsider or is a party to the action. No personal liability to repay is contemplated in either case. The lender gets only a charge on the undertaking; and I doubt whether he can, by virtue of such a charge, stop the business. My impression is that his only right is to have repayment out of the proceeds of the undertaking as and when realized. And it might well be held that any person advancing money under these circumstances could not deprive the officer of the Court of his proper demand for work done and services rendered in the course of the carrying on and winding up of the business. But, having regard to the observations of Lord Halsbury in *Strapp* v. *Bull, Sons & Co.* (1), which were concurred in by his colleagues, I do not feel at liberty to say that there is not a difference between the position of a stranger and that of the plaintiff. The Court will, however, not lightly assume that the undoubted claim of a receiver and manager to indemnity has been overridden and defeated by an order to which he is not a party, and on the making of which he would not be entitled to be heard. It presumes, in the case of a party to the litigation who finds the required money, that the money is found on the understanding that the receiver and manager is acting for such party, not merely in his original character, but also in his fresh character of moneylender. In short, the receiver and manager is considered to be carrying on the business with a view to realization for the benefit of all whom it may concern, being parties to the

(1) [1895] 2 Ch. 1.

action either individually or by representation. It follows that the receiver and manager is entitled to priority. This is only a prima facie rule; it must yield to express language, and, of course, the receiver and manager may waive or postpone his right.

These are the conclusions I draw from *Strapp* v. *Bull, Sons & Co.* (1) In the present case I find nothing in the orders of the Court sufficient to negative the presumption. My doubt has arisen on the terms of the documents executed by the receiver in favour of the plaintiffs; but, upon the whole, I think they were only intended to give effect to the orders of the Court, and were not intended to enlarge the operation and effect of these orders. The proviso exempting the receiver from personal liability does not suffice to lead me to infer that he intended to waive his right to indemnity.

I think it would be desirable in future that orders of this nature should expressly state whether the charge is to be subject to or free from the receiver's claim.

Solicitors: *Maddison, Stirling & Humm; Godden, Son & Holme.*

(1) [1895] 2 Ch. 1.

G. I. F. C.

[- C. A.

1906

Jan. 15, 16.

In re NISBET AND POTTS' CONTRACT.

Vendor and Purchaser—Restrictive Covenants—Negative Covenants—Title by adverse Possession—Squatter's Title—Trespasser—Twelve Years' Possession—Acceptance of less than Forty Years' Title—Notice—Statute of Limitations—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57).

A negative covenant validly created, entered into by an owner of land with an adjoining owner; such as a covenant restricting the user of the land, binds the land in equity, as being in the nature of a negative easement: *London and South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch. D. 562, 583; and it can, therefore, be enforced against any subsequent owner of the land not being a bona fide purchaser for value of the legal estate without notice. Such a covenant is equally binding in equity upon land to which a squatter has subsequently acquired a statutory title by adverse possession against the owner and covenantor for twelve years under s. 34 of the Real Property Limitation Act, 1833, as amended by the Real Property Limitation Act, 1874; for the statutory "extinguishment" of the title of the dispossessed owner of the land has not the effect of destroying the covenant, the equitable right of the covenantee not being in any way affected by the statute, and consequently the covenantee can enforce the covenant against the squatter both before and after he has acquired his possessory title, and also against any subsequent owner of the land not being a bona fide purchaser for value without notice.

Neither a squatter who has acquired a good title by possession, nor a purchaser from him, is exempt from liability arising through his not insisting on and obtaining a full forty years' title. Therefore, if any purchaser under the squatter's possessory title chooses to accept less than a forty years' title, he is fixed with constructive notice of all such equities affecting the land as he would have discovered by reasonable inquiries under a title for the full period.

Thus, where, on a purchase for value of freehold land, the purchaser agreed to accept a title commencing with a possessory or squatting title acquired within forty years prior to the purchase, he was held to have constructive notice of restrictive covenants affecting the land entered into within the forty years by an owner before the squatter took possession.

Decision of Farwell J., [1905] 1 Ch. 391, affirmed.

By an agreement in writing, dated January 1, 1903, Fred Vickers Nisbet agreed to sell to Samuel Leonard Potts a piece of freehold land called Wallwood Farm, Hainault Road, Leytonstone, Essex, for 3200*l.*, subject to the payment of the usual

deposit (which was duly paid) and to certain conditions of sale, of which condition 2 was as follows: "The title to the property shall commence with an indenture of conveyance dated the 11th day of August, 1890, in which indenture it is stated that Thomas Headde and his father had at that date been in possession of the said property for thirteen years and upwards. This indenture has been produced to the purchaser prior to the signing hereof, and the purchaser shall be deemed and considered as having full notice and knowledge of the contents thereof and shall buy subject thereto and be bound thereby." A further condition provided for the sending in of requisitions in writing to the vendor's solicitor within seven days from the delivery of the abstract, and that "all objections and requisitions not sent within that time shall be considered to be waived, and for the purpose of any objection or requisition the abstract shall be deemed perfect if it supplies the information suggesting the same, although otherwise defective." Under another condition, 5, the property was sold "subject to all rights of way, water, and other easements, if any, subsisting thereon, and no error, misstatement, or misdescription shall annul the sale, nor shall any compensation be claimed or allowed in respect thereof."

The purchaser was a builder, and his intention in entering into the contract was to erect upon the land shops and buildings of a similar class; but on February 21, 1903, he received a letter from a firm of solicitors acting for adjoining freeholders on the Fillebrook Estate, of which Wallwood Farm formed part, informing him that the land he had purchased was subject to certain covenants in favour of those freeholders restricting building on the land, and threatening proceedings in the event of his erecting shops in breach of those covenants. Having thus for the first time heard of the existence of those covenants, the purchaser made further inquiries, and then ascertained that a conveyance of Wallwood Farm, dated March 13, 1872, to William Talbott Thomas Kidd, dated November 9, 1867, contained a covenant by Kidd, for himself, his heirs, executors and administrators, with the grantors, the owners of the adjoining land, part of the Fillebrook Estate (amongst other building restrictions), that no house or other building should be erected on

C. A. 1906

NISBET AND POTTS' CONTRACT, *In re.*

the land thereby granted within thirty feet of Hainault Road, and that no building then erected or which might thereafter be erected on that land should be used as a shop or other place for carrying on any trade or business, or otherwise than as a private dwelling-house. Ultimately, on February 10, 1904, an abstract of title was delivered to the purchaser's solicitors, commencing, as stipulated by the contract, with the conveyance of August 11, 1890, whereby, in consideration of 700*l.*, the property was conveyed by Thomas Headde to C. S. Davis, I. Davis, and L. Levy in fee simple. The conveyance contained no recitals, but in the parcels it was stated that the property had formerly been in the occupation of W. T. T. Kidd, and "has since the date of the death of the said W. T. T. Kidd been in the possession of the said Thomas Headde and his father for a period of thirteen years and upwards." Another abstracted deed was one dated November 29, 1901, whereby the property was conveyed for value by I. Davis and L. Levy, in whom the entirety had then become vested, to the present vendor, Nisbet, in fee simple. That conveyance was supported by a statutory declaration, dated November 25, 1901, made by I. Davis and L. Levy, and stating that before they entered into the conveyance of August 11, 1890, they were informed by their co-purchaser, C. S. Davis (then recently deceased), who had previously known the property, and they verily believed, that Thomas Headde and his father, Joseph Nash Headde, had been in possession of the property for thirteen years and upwards, and that during that time no rent had been claimed or paid, or acknowledgment of title made, to any person, or claim made or action commenced by or on behalf of the heir of W. T. T. Kidd or any person claiming through him, or by any other person whomsoever, for possession of the said property or any part thereof. And the declaration went on to state that since the execution of the said indenture of August 11, 1890, no claim whatever had been made to the property by the heir of the said W. T. T. Kidd or by any other person. The abstract did not in any way disclose the existence of any restrictive covenants affecting the property.

On February 16, 1904, the purchaser's solicitors delivered requisitions to the vendor's solicitors, of which No. 11 was:

"The property appears to be subject to restrictions which are fatal to the title." The requisition then went on to state the short effect of the restrictive covenants and that the purchaser had been threatened with proceedings in the event of his committing any breach of them. The requisition concluded thus: "How does the vendor reconcile this fact with the assurance made by his solicitor and the vendor, before the contract and after, that there were no building restrictions? Unless the purchaser is satisfied that these restrictions do not exist, he will be compelled to rescind the contract."

On February 25, 1904, the vendor's solicitors replied to the requisitions, the answers being headed with this general statement: "The purchaser having taken possession of the property and accepted the title, these requisitions are answered as a matter of courtesy and without prejudice to the vendor's rights." Then requisition 11 was answered thus: "This requisition is barred by clause 5"—as to the property being sold subject to all easements—"of the contract. The vendor purchased without notice, and having regard to this and the fact that the title is one by adverse possession, these covenants would not now bind the land." And then followed a denial that any such assurance as was mentioned in the requisition was ever given.

The vendor, Nisbet, admitted by affidavit that on his purchase from Messrs. Davis and Levy under the conveyance to him of November 29, 1901, he accepted the title as "a possessory or squatting title under the Headdes, father and son"; that neither he, Nisbet, nor his then solicitor had any reason to believe that the property was or ever had been subject to any restrictive covenants; and that on his purchase the existence of any such covenants was not even suggested, but that some time afterwards on proposing to obtain a declaration of absolute title under the Declaration of Title Act, 1862, and in making searches in order to obtain information under that Act, he learnt for the first time that under the deed of March 13, 1872, the property was subject to restrictive covenants, though on inquiry he was informed and believed it to be the law that an owner by adverse possession acquired a title good against the world and freed from all restrictions or covenants affecting the

C. A. 1906

NISBET AND POTTS' CONTRACT, *In re.*

old title, and accordingly he informed the purchaser shortly before the date of the contract that "the title was good being a possessory one," and was therefore free from any restrictions whatever; but he did not appear to have told the purchaser that the property had been at one time subject to any restrictions in particular.

The result of accepting on his purchase in 1901 a twenty-three years' title, commencing in or about 1878, was that Nisbet abstained from making any inquiries whatever as to the earlier title; consequently he had no actual notice of the restrictive covenants, though he would in all probability have become aware of them if he had insisted upon the usual forty years' title.

The purchaser, Potts, having made fruitless appeals to his vendor, Nisbet, to release him under the circumstances from his contract, and to return his deposit, took out a summons on April 22, 1904, under the Vendor and Purchaser Act, 1874, asking for a declaration that his, the purchaser's, objections to the title had not been sufficiently answered and a good title had not been shewn; or, alternatively, that the title shewn was not one which he, the purchaser, ought to be compelled to accept; and for a return of the deposit with interest.

Upon the summons coming on for hearing before Farwell J. the question was raised by the vendor whether the purchaser had not accepted the title by taking possession; but, as the evidence on this point was insufficient, it was agreed that the question of law should be argued, and that, if necessary, the summons should stand over for further evidence.

The main question of law argued was whether, in the circumstances, the property was subject, in the hands of the present vendor, Nisbet, to the restrictive covenants above mentioned.

For the purpose of the argument it was admitted—(1.) that Thomas Headde had acquired a possessory title in 1890; (2.) that there was in existence a deed dated in 1872 containing restrictive covenants which affected the land contracted to be sold or a material part of it; and (3.) that neither the present vendor when he bought from Davis and Levy in 1901, nor the purchasers from Thomas Headde in 1890, made any inquiry into the title prior to 1878.

Farwell J. held, as already reported, that the land in the hands of Thomas Headde was bound by the restrictive covenants; that the burden of those covenants was paramount to the estate of the owner dispossessed under s. 34 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) (1), and was not extinguished by Thomas Headde's possessory title; and that the purchasers from Thomas Headde in 1890, and also the present vendor, Nisbet, when he purchased from Davis and Levy in 1901, having chosen to purchase with less than a forty years' title, must be deemed to have had constructive notice of the covenants. Accordingly, his Lordship made a declaration that a good title had not yet been shewn by the vendor, and ordered return of the deposit with interest at 4 per cent., and payment by the vendor of the purchaser's costs of the summons and of investigating the title.

The vendor appealed from his Lordship's order.

The appeal was heard on January 15 and 16, 1906.

Jenkins, K.C., and *A. Romer Macklin*, for the vendor. 1. In order to apply the doctrine of *Tulk* v. *Moxhay* (2) two things must be proved—first, that the person to be bound by the restriction derived possession from the covenantor; and, secondly, that he took with notice of the restrictive covenant. Even though a purchaser has notice of a restriction upon the user of the land, unless he takes a derivative title from the covenantor he is not bound by the restrictive covenants. That is the true result of *Tulk* v. *Moxhay* (2) and of the other cases collected in *Keates* v. *Lyon*. (3) *Mann* v. *Stephens* (4) as explained by Lord Cottenham in *Tulk* v. *Moxhay* (5) in the report of his judgment in the *Law*

(1) Sect. 34: "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

By sect. 9 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), the time for acquiring a possessory title under s. 34 of the previous Act is reduced from "twenty years" to "twelve years."

(2) (1848) 2 Ph. 774; 18 L. J. (Ch.) 83.

(3) (1869) L. R. 4 Ch. 218, 222-5.

(4) (1846) 15 Sim. 377.

(5) 18 L. J. (Ch.) 90.

C. A. 1906 — NISBET AND POTTS' CONTRACT, *In re.*

Journal bears out this view. The doctrine is not confined to the assigns of the covenantor in the strict legal sense of the word; it has been extended to a tenant from year to year: *Wilson* v. *Hart* (1), and even to an occupier: *Mander* v. *Falcke* (2); but in both those cases the person taking possession derived title under the covenantor, and except for the dictum of Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (3), there is no indication that any person can be liable unless he takes possession under a derivative title. If necessary, we say that an adverse possessor, even before the statutory period has run, would not be bound by the restriction; but at any rate, he would not be bound after the expiration of that period.

Further, notice is part of the cause of action. In other words, the burden of proving notice is on the person seeking to enforce the restriction. That is the view of the doctrine of *Tulk* v. *Moxhay* (4) taken by the Privy Council in *McLean* v. *McKay* (5), and by Mellish L.J. in *Leech* v. *Schweder*. (6) The dictum of Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (3), which is opposed to this view, is, it is submitted, wrong, both in not confining the obligation to persons claiming a derivative title and in not making notice part of the cause of action. In *Tulk* v. *Moxhay* (4) Lord Cottenham L.C. took into consideration the fact that the price to be paid by the purchaser would be affected by the restriction; but this consideration cannot apply unless the purchaser has notice of the restriction, or unless he claims through the covenantor. The statement of the doctrine by Cotton L.J. in *Hall* v. *Ewin* (7) is inconsistent with the dictum of Jessel M.R. *Clegg* v. *Hands* (8) is to the same effect. In *Mander* v. *Falcke* (2) Lindley and Bowen L.JJ. regarded the notice as part of the cause of action. Farwell J. relied on the fact that the dictum of Jessel M.R. was approved by the Court of Appeal in *Rogers* v. *Hosegood* (9); but in that case the question was not as to the burden, but as to the benefit of the covenant, and the judgment of the Court of Appeal contains a

(1) (1866) L. R. 1 Ch. 463.
(2) [1891] 2 Ch. 554.
(3) 20 Ch. D. 562, 583.
(4) 2 Ph. 774; 18 L. J. (Ch.) 83.
(5) (1873) L. R. 5 P. C. 327, 336.
(6) (1874) L. R. 9 Ch. 463, 474.
(7) (1887) 37 Ch. D. 74, 79.
(8) (1890) 44 Ch. D. 503.
(9) [1900] 2 Ch. 388.

statement of the law which supports our contention and appears to be inconsistent with the dictum of Jessel M.R.

2. A person who buys a possessory title cannot be affected by constructive notice of the prior paper title.

[COZENS-HARDY L.J. How do you explain *Patman* v. *Harland* (1), which says that although a purchaser may elect to buy with a shorter title, he must be put in the same position as if he took a forty years' title?]

We do not dispute that principle, but it applies only to what appears upon the title; and it is so expressly limited by s. 3 of the Conveyancing Act, 1882. Sub-s. 1 of that section provides that "a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him." Therefore, in this case the two questions for the Court are: (1.) Ought the vendor to have inquired into the title which lay in grant before the possessory title? (2.) If he had inquired, would the fact of the restriction have come to his knowledge? We say, first, that it is no part of the vendor's title to shew the title of the man who has been ousted; and, secondly, that if he had inquired into that title, he would not have obtained information of the restrictive covenant. The statute does not warrant the Court in saying that the vendor took subject to all risks. We do not dispute the general principle established by *Patman* v. *Harland* (1) and *In re Cox and Neve's Contract* (2), that a purchaser of real estate who chooses to take less than the forty years' title which he has the right to demand is affected with constructive notice of an equitable incumbrance of which he would have had actual notice if he had insisted on a title for the full period; and that if he bargains for less than a forty years' title he does so at his own risk, for he cannot get out of the Conveyancing Act, 1882, merely by shutting his eyes. But the question whether in any particular case he is in fact bound by constructive notice depends upon the facts. Thus, the doctrine of constructive notice does not apply where either the deed of which notice is sought to be imputed is not

(1) (1881) 17 Ch. D. 353. (2) [1891] 2 Ch. 109.

C. A. 1906

NISBET AND POTTS CONTRACT, *In re.*

part of the chain of title, or where it may not affect the title: Dart's Vendors and Purchasers, 7th ed. pp. 877—8. In modern times the rigidity of the old law as to constructive notice has been relaxed, and the trend of the law at the present day is to make land as alienable as possible. The effect of the creation of a possessory title under the Statute of Limitations was to destroy the old legal estate and to set up an entirely new legal estate; and when the old legal estate was destroyed all equitable estates fell with it. The fallacy underlying Farwell J's. judgment is that he has treated a squatter as a person who has acquired the legal estate by a voluntary conveyance, in which case he would, of course, be bound by any existing equitable estate or interest, such as a trust. But it is submitted that the true view is that the acquisition of the legal estate by the squatter here protected him from prior equitable interests, and that the doctrine of constructive notice is not to be carried to such an extent as to defeat an honest purchaser: *Bailey* v. *Barnes*.(1) Here we were told by our vendor that this was a squatter's title; and therefore the precautions usually taken on purchasing land the title of which has devolved in the ordinary way were wholly unnecessary on our part. In the circumstances we submit that the learned judge was wrong in holding that we ought, under the Conveyancing Act, to have made inquiries, and that he was still more wrong in saying that if we had made inquiries we should have discovered that the land was bound by these restrictive covenants.

Then, with regard to a restrictive covenant of this nature, is it so binding on the land as to create an interest in the land? We submit that the affirmative is not established by the authorities. But assuming that such a covenant does create some interest in the land, does it affect a person who acquires land under the operation of the Statute of Limitations? It is true that the original owner of the land has bound himself by covenant not to use the land except under certain conditions, and it may be said that that covenant binds any person who derives title from that original owner. But, as we have said, our title is not a derivative title at all; it is a title acquired solely under the statute, and

(1) [1894] 1 Ch. 25, 30–1, 34–5.

that being so, it is free from all restrictions on the estates of former owners: *Tichborne* v. *Weir*. (1) The legal estate by possession under s. 34 of the statute is acquired through the legal estate of the person ousted being "extinguished," and thus the statute creates an entirely new estate in the land. It is accordingly submitted that any equitable estates or interests originally carved out of the destroyed legal estate are no longer binding upon the person who claims the legal estate by an actual disseisin: Gilbert on Uses, 3rd ed. p. 429, note 6. The old and well-settled rule there stated applies, we submit, equally to a disseisin brought about by s. 34 of the statute. Thus, the validity of covenants of this nature depends upon the validity of the legal estate of the owner who created them and of the persons subsequently taking by transfer from him, but they have no relation to a legal estate acquired by operation of the statute. Accordingly, Farwell J. was wrong in saying that Headde, who acquired the legal estate by statute, and was not a purchaser for value, was bound by this covenant. We admit that if the disseisor is to be regarded as being in the same position as a voluntary assignee, then he is bound. The reasoning in *Tulk* v. *Moxhay* (2)—that a purchaser who pays less for the land purchased in consequence of its being subject to a restrictive covenant cannot afterwards say that that restrictive covenant was no longer binding—has no application to a disseisor under the Statute of Limitations, for he does not pay anything for his land. This is not so doubtful a title that the Court will not enforce specific performance of it: *In re Scott and Alvarez's Contract*. (3)

Upjohn, K.C., and *A. H. Jessel*, for the purchaser. We submit that the learned judge was right in holding that the Court would not force such a title as this upon a purchaser. In the first place, a restrictive covenant of this nature does create "an interest in land" so as to be binding on the land: *London and South Western Ry. Co.* v. *Gomm*. (4) And it is submitted that Sir G. Jessel's view of the law is correct when he there says that a restrictive covenant is in the nature of a "negative easement."

(1) (1892) 67 L. T. 735.
(2) 2 Ph. 774.
(3) [1895] 2 Ch. 603.
(4) 20 Ch. D. 562, 582.

C. A. 1906 NISBET AND POTTS CONTRACT, *In re.*

[COLLINS M.R. That view has been adopted in *Rogers* v. *Hosegood*. (1)]

That is so. In the case of a restrictive covenant you have, just as in an easement, a dominant and a servient tenement. The two obligations are analogous. A person entitled to enforce a restrictive covenant under the doctrine of *Tulk* v. *Moxhay* (2) is not in any way affected by the Real Property Limitation Act, 1833; his right is not within the statute at all, for he cannot enforce the covenant by making any entry or distress or bringing any action for the recovery of land. The right to the benefit of the covenant is merely collateral to the land, and is only enforced by a Court of Equity as being binding on the consciences of persons in the possession of the land who have notice: *Formby* v. *Barker*. (3) Neither is an easement affected by the statute. Accordingly we submit that Farwell J.'s view is right. The argument that a squatter or trespasser is not bound by a previously created restrictive covenant, whether he has notice of it or not, is opposed to the principle that such a covenant is, like an easement, inherent in the land and binding on the land itself. We dispute the proposition that a person acquiring land from a disseisor is not bound to inquire into the previous title, and is not affected with notice of anything appearing upon it. We rely on *In re Cox and Neve's Contract* (4) and *Jacobs* v. *Revell* (5) as shewing that the fact of a purchaser accepting less than the full forty years' title does not exonerate him from inquiry into the earlier title, and that if he fails to do so he must take the consequences. It has long been settled that a purchaser is fixed with notice of a fact which he might have discovered by using due diligence: *Jackson* v. *Rowe*. (6) If it were otherwise a mere disseisor would have a marketable title. It is said that even by reasonable diligence the existence of this restrictive covenant could not have been discovered; but there is no evidence as to what inquiries, if any, the vendor made. The onus is on the vendor to shew that when he purchased he made inquiries; the obligation is upon him to

(1) [1900] 2 Ch. 405.
(2) 2 Ph. 774.
(3) [1903] 2 Ch. 539, 551, 554.
(4) [1891] 2 Ch. 109.
(5) [1900] 2 Ch. 858, 869.
(6) (1826) 2 S. & S. 472.

obtain and deduce a forty years' title, and if he chooses to deduce a shorter title he does so at his own risk: *In re Cox and Neve's Contract.* (1) As to the effect of a restrictive covenant of this kind, it is an obligation conferring a paramount right which the adjoining owner has over this land, and it binds the land in the hands of a squatter, the fact of his not claiming the land under the original owner being quite immaterial. The right is an equitable right to have the land preserved in the same condition as it was when in the hands of the original owner. The Real Property Limitation Act, 1833, contains no provision whatever that the statutory conveyance under s. 34 shall affect the rights of third parties paramount to the estate, or that the creation of a new legal estate as between A. and B. shall bar an equitable right attached to the land and belonging to some third person: *Ecclesiastical Commissioners for England* v. *Parr.* (2)

As to the note in Gilbert on Uses, 3rd ed. p. 429, note 6, that has no reference to such a case as the present, nor to an affirmative or a negative easement at all. It apparently refers to cases of possession by a trustee under ss. 24 and 25 of the Act, and seems to be in accordance with the law as laid down in *Burroughs* v. *M'Creight* (3), *Bolling* v. *Hobday* (4), and *Knight* v. *Bowyer* (5)—namely, that where land is vested in a trustee for certain persons, and there is possession adverse to the trustee of such a character that, apart from the question of trust, his title would be barred, the beneficiaries are barred equally with the trustee if they fail to exercise their right to bring an action for recovery of the land within due time, because the possession is adverse to them equally with the trustee. A person entitled to the benefit of a restrictive covenant has no such interest in the land bound by the covenant as can be barred by possession under the statute. The covenant is merely a burden upon the land, and the person entitled to the benefit of it has no "right to the possession or recovery of the land" at all. It is nothing more than "an equity attached to the property by the owner," and no one purchasing the property with notice of that equity can stand in

(1) [1891] 2 Ch. 109.
(2) [1894] 2 Q. B. 420, 430.
(3) (1844) 1 J. & Lat. 290, 304.
(4) (1882) 31 W. R. 9.
(5) (1858) 2 De G. & J. 421.

C. A. 1906 — NISBET AND POTTS' CONTRACT, *In re.*

a different position from the party from whom he has purchased: *Tulk* v. *Moxhay* (1); *Haywood* v. *Brunswick Permanent Benefit Building Society* (2); *London and South Western Ry. Co.* v. *Gomm* (3); *Hall* v. *Ewin* (4); *Rogers* v. *Hosegood* (5); *Wilson* v. *Hart.* (6) It would be a singular result that while a purchaser for valuable consideration of land subject to such a covenant as this would be bound by it, a person acquiring the land by successful trespass, and without any payment whatever, would not be bound.

A. Romer Macklin, in reply. The question in such a case as this is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased: *Tulk* v. *Moxhay* (7); and that is our contention here. The doctrine of *Tulk* v. *Moxhay* (8) as regards restrictive covenants running with the land only applies where the title to the land is acquired derivatively with notice: *Haywood* v. *Brunswick Permanent Benefit Building Society.* (2) There is no authority deciding that the burden of a restrictive covenant does more than bind the assignees of the land if they have notice. Any extension of that doctrine is not consistent with *Tulk* v. *Moxhay* (8), where the question was one of conscience coupled with that of price. It is said that a person in the position of "a mere occupier" is bound by the covenant: 1 Smith's Leading Cases, 11th ed. p. 90, note to *Spencer's Case* (9); but such a person is so bound because he holds under a derivative title, whereas a trespasser does not.

The deed of 1872 containing this covenant is no part of the chain of our title; there is nothing in the nature of a transfer to our vendor, the squatter, so that his title was in no sense a derivative one, and therefore we were not subject to the liability still imposed upon a purchaser by s. 3, sub-s. 2, of the Conveyancing Act, 1882, of performing or observing any covenant "or restriction contained in any instrument under which his title is derived, mediately or immediately."

(1) 2 Ph. 778.
(2) (1881) 8 Q. B. D. 403, 409.
(3) 20 Ch. D. 562, 583.
(4) 37 Ch. D. 74.
(5) [1900] 2 Ch. 388, 405.
(6) L. R. 1 Ch. 463.
(7) 2 Ph. 777.
(8) Ibid. 774.
(9) (1582) 5 Rep. 16 a.

COLLINS M.R. This appeal has been most clearly and succinctly argued on the part of the appellant, but I have come to the conclusion that the learned judge's judgment is right. In point of fact, so exhaustive does his judgment appear to me to be, that I should not venture to add or substitute anything of my own for it, except that I feel bound, in deference to the very able arguments which have been addressed to us, to give my decision in my own language.

The question before us arises in this way. An application has been made by the appellant, the vendor, to have it declared that he has made a good title and one which the purchaser ought to accept. What the vendor himself bought was what he himself describes in his affidavit as a "squatting title." A certain person had remained in undisturbed possession of freehold land for more than the statutory period, beginning in or about 1878, so that, at the expiration of the necessary time, he had acquired such right as arises to a person who has been in possession of land under the Statute of Limitations for the statutory period, with the result that the title of the true owner was extinguished. Now the appellant, Nisbet, who purchased that squatter's title, contented himself with that title; that is to say, he contented himself with limiting his inquiries to the state of things subsequent to 1878. But subsequently to the date of the present contract the present purchaser, Potts, ascertained, not from any materials actually placed before him when examining the title, but from independent information, that, in point of fact, the person who had been dispossessed by the squatter had, in the year 1872, he being then the owner of the land in question, entered into a covenant with the owner of the adjoining land whereby certain building restrictions were placed on the user of the land, the subject of this contract. Having thus had notice of that covenant, the purchaser, Potts, made a requisition upon it to the vendor, whereupon the vendor raised two contentions: First, that it was a matter with which he was absolutely unconcerned: that the squatter under whom he claimed had, by virtue of the Statute of Limitations, acquired a title paramount to any preceding covenants or obligations entered into by the original owner of this property, so that any right

C. A. 1906

NISBET AND POTTS' CONTRACT, *In re.*

Collins M.R.

arising out of those covenants or obligations had become extinguished together with the extinguishment of the title of that original owner, and the squatter had, as it were, come into the possession of a clean slate and was able to pass on the property entirely free from any such covenants or obligations; and that, therefore, inasmuch as he, the present vendor, was a purchaser from the squatter, he in his turn received the land discharged from those covenants or obligations, and was able to pass it on to any purchaser from him. Accordingly, Nisbet, the present vendor, insisted that it was wholly immaterial whether or not any former owner prior to the statutory title acquired by the squatter had imposed any such obligation upon himself and upon the land.

Then the second point was this, that even if this restrictive covenant was an obligation imposing such a burden upon the land as would pass on through the squatter to any purchaser from him, yet that such purchaser, unless he was a purchaser with notice of the burden, would be discharged from it; and it was contended that Nisbet, the purchaser from the squatter, had neither actual nor constructive notice of the burden.

With regard to the first point, the real question seems to me to be whether or not the effect of the Statute of Limitations was to vest the land in the squatter, at the expiration of the statutory period, discharged from the obligation of the covenant which had been created by the owner whose title had been "extinguished." Now, if the land was not so discharged from the obligation of the covenant, then the burden of that covenant remained on the land to which the squatter had become entitled simply through the extinguishment of the right of the dispossessed owner to turn him out; and inasmuch as that burden still continued to be imposed on the land, notwithstanding the squatter's acquisition of it, every person who took that land from the squatter would take it subject to the obligation of that covenant, unless he could prove that he was a purchaser for value without notice.

Now, whether or not that burden was imposed upon the land in the hands of the squatter depends upon the nature of the obligation created by the restrictive covenant. That there was

such a covenant entered into by the owner of the land, whose right was afterwards extinguished, there can be no doubt whatever. It was admitted that a squatter could not take land freed from an affirmative legal easement; and I understand it to be admitted also that if the right arising out of the restrictive covenant entered into by the former owner of the land was such as Sir George Jessel, M.R. considered it, namely, analogous to a negative easement, then the squatter would take the land subject to the paramount right created by the obligation imposed by the covenant which adhered to the land, and the burden of that covenant would pass to those persons who might become assignees of the land or might acquire in any way a title to the land. It has been contended by the appellant's counsel that the squatter here never was an assignee—that he never was a purchaser; and that, therefore, he does not come under the condition that a purchaser with notice is bound by it, but that he is a person who takes by a title given to him by law, and which, it is said, is paramount to and overrides any such obligation as would otherwise have attached to the land: in other words, that the squatter coming in by operation of law and not by conveyance takes independently, and freed from all such collateral obligations.

The question whether that contention can be supported must depend upon the language and effect of the statute itself. Therefore, we have to see what the machinery of the statute is, and what, in point of fact, it effects. Now, the Statute of Limitations, as one would expect, does not purport to annul by lapse of time any rights other than those which persons might have, and ought to have, exercised during the period limited. The statute does not begin to run in any case against a person until that person has been put to what is generally called his "right of entry." Unless the circumstances have been such as to put the person who is to be barred by the lapse of time upon the assertion of his right, the time does not begin to run against him. All that the statute does is this. By s. 34 it says: "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of

C. A. 1906

NISBET AND POTTS' CONTRACT, *In re.*

Collins M.R.

such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished." That is the whole right the squatter acquires, namely, the extinguishment of a title adverse to his own. But how does that affect the question here? What machinery is there in the Statute of Limitations affecting the right of a covenantee who has the benefit of a restrictive covenant? Nothing in the Act has been pointed out to us which touches that right at all. In fact, unless and until the right of the covenantee has been in some way infringed, so that it becomes necessary for him to enforce that right, there is no reason, either in principle or in fairness, why his right should be in any way affected. The person who stands simply with the benefit of a negative easement is certainly not put upon the assertion of his right unless and until that right has been interfered with in some way; and it is a matter of absolute indifference to him what person is the owner of the land over which that right exists until that land is used in some manner incompatible with the assertion of that right on the part of the person entitled to it. It seems to me, therefore, that the principal question before us is whether or not Sir George Jessel was right in the view that he took in *London and South Western Ry. Co.* v. *Gomm* (1), that an obligation created by a restrictive covenant is in the nature of a negative easement, creating a paramount right in the person entitled to it over the land to which it relates. If that is so, then, in the present case, the squatter, by his squatting, simply acquired a right to land subject to this incident. Of course, the burden of that incident must pass to all persons who subsequently become assignees of the land, and the squatter is not entitled to hand it over freed from the obligation that was imposed on the person whose title he has ousted by his possession.

Now, is that the law or not? In the first place, I do not think there was anything inconsistent in the view taken by Sir George Jessel with the law as laid down in the leading case of *Tulk* v. *Moxhay* (2), though, no doubt, words are used there pointing to the equity arising out of the injustice which would accrue if a

(1) 20 Ch. D. 562. (2) 2 Ph. 774.

person who had acquired land at a reduced price by reason of its user being subject to a restriction were afterwards enabled to pass on that land to other persons freed from that restriction receiving in return, on that ground, an increased price. That element, no doubt, does enter into consideration, when one comes to inquire what is the position of a person who acquires for value the legal estate in land subject to a right that has previously been created in another person to restrict the user of that land. The right so created is an equitable right, and, therefore, it is one capable of being defeated in certain circumstances by a person who acquires the legal estate for value. The question thus arises whether, in the circumstances of the particular case, there is anything which would make it inequitable for that person to avail himself of his legal estate to defeat that equitable right. That, as Mr. Upjohn pointed out, is an inquiry which is inevitable in cases where you are dealing with equitable rights and legal estates. But that does not in the least prevent the right in question being what Sir George Jessel considered it to be, namely, a burden imposed upon the land, and passing with the land, subject, of course, to this, that it may be defeated by a purchaser for value without notice; but the burden is upon the person who takes the land to shew that he has acquired it under such conditions as to defeat the right as against him, namely, that he has acquired it for value and without notice.

Now, that being Sir George Jessel's view in *Gomm's Case* (1), it seems to me that that view has been adopted more than once in this Court. In *Rogers* v. *Hosegood* (2), although the point which arose in that case was, strictly, the running of the benefit, and not the running of the burden, as has been pointed out by the learned counsel for the appellant, yet, in my opinion, the principle which was dealt with there was not limited only to the running of the benefit, but also extended to the running of the burden; and I cannot help thinking that the Court there did guide itself by and adopt, as expressing the true view in this matter, the view taken by Sir George Jessel in *Gomm's Case.* (1) It seems to me, therefore, that that view stands, not only on the great authority of Sir George Jessel, but also upon the authority

(1) 20 Ch. D. 562. (2) [1900] 2 Ch. 388.

C. A. 1906

NISBET AND POTTS' CONTRACT, *In re.*

Collins M.R.

of this Court in more recent cases—namely, in *Rogers* v. *Hosegood* (1), *Hall* v. *Ewin* (2), and in *Haywood's Case.* (3)

Therefore, it seems to me that the law is clearly established in accordance with Sir George Jessel's view of the subject, and consequently that in this case the burden of the restrictive covenant did remain imposed on the land so as to be binding upon any person who could not shew that he had bought for value and without notice. Consequently it appears to me that the squatter's title does not in any way assist the appellant in this case.

Then that brings me to the second point. Has the appellant, the present vendor, shewn—as the burden is upon him to shew—that, having bought this land for value, he bought without notice of this incumbrance? There, again, it seems to me quite clear that he has not discharged that burden. He admits that he accepted, possibly he bound himself to accept, a title commencing in 1878. He was entitled to demand a title of forty years, and it seems perfectly clear now that if he had insisted upon a title of forty years he must have had before him the existence of a covenant entered into as late as 1872 by the person whose title was displaced or "extinguished"—to use the expression in the statute—by the possession for the statutory period of the person through whom the present vendor, Nisbet, now claims. That is equivalent to notice. In point of fact, by exercising reasonable care in demanding the title to which he was entitled, Nisbet must have discovered the fact that there was this burden; and, if so, that is proof that he must be taken as having had constructive notice of it. It is not even necessary to go as far as that, because I agree with Farwell J. in this, as in all other points of the case, that, the burden being upon Nisbet to shew that he had himself bought for value without notice, he has not discharged that burden by simply saying, "I did not push my inquiries beyond that." It is said to be doubtful whether he could have actually discovered the existence of the covenant: but that does not seem to me to discharge the burden of proof that lies upon the appellant; and therefore I am of opinion, on

(1) [1900] 2 Ch. 388. (2) 37 Ch. D. 74.
(3) 8 Q. B. D. 403.

all grounds, that he is not in a position to enforce the contract against the purchaser. The result is that the appeal fails and must be dismissed with costs.

ROMER L.J. I also have come to the same conclusion as that arrived at by Farwell J., and for the reasons given in his very clear judgment. I also agree with what the Master of the Rolls has said; and I might be contented with leaving the case as stated in those two judgments, but, having regard to the importance of the case, I desire to add a few words of my own upon some of the important points that arise in it.

In the first place, with regard to the general doctrine concerning a negative covenant, such as we are dealing with in this case, I think that whatever reasons may have been given for the doctrine in the earlier cases, and notwithstanding the way in which the doctrine has been referred to in some judgments in early cases, yet, at the present day, the doctrine ought to be regarded as well settled. I think the law is that such a covenant, when validly created, binds the land in equity, and can be enforced as against subsequent owners of the land, subject only to the limitation that, being equitable, it cannot be enforced as against a bona fide purchaser of the land—that is to say, of the legal estate—without notice. This was clearly pointed out by Sir George Jessel M.R. in the case of *London and South Western Ry. Co.* v. *Gomm* (1), where, referring to *Tulk* v. *Moxhay* (2), he says this (3): "The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (4) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevented the owner of the servient tenement from building so as to obstruct the light." Then, speaking of a negative covenant, such as not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, he says: "This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter

(1) 20 Ch. D. 562.
(2) 2 Ph. 774.
(3) 20 Ch. D. 583.
(4) 5 Rep. 16 a.

C. A. 1906

NISBET AND POTTS' CONTRACT, *In re.*

Romer L.J.

whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." And, as pointed out by my Lord, in subsequent cases that view of the law has been adopted by this Court. Indeed, to hold otherwise would lead to a result which, in my opinion, would be lamentable; for, according to the contention of the appellant, the result would be that while any person in occupation of the land claiming through the covenantor, even though only a tenant from year to year or a mere occupant by permission, would be bound by the covenant, yet a squatter going into occupation, without any right or any permission of the true owner, could say that, as between him and the covenantee, the land was freed from the covenant. In other words, the squatter could, as against the covenantee, successfully plead his own trespass as putting him in a better position than if he had gone upon the land by right. I cannot think that the law necessitates any such result. On the contrary, as I have said, in my opinion the negative covenant does bind the land in equity; and I think that with regard to a subsequent squatter, dealing in the first place with the time before that squatter has acquired any statutory right by lapse of time, inasmuch as he could not say he was a purchaser of a legal estate without notice, he would be bound by the covenant during his squatting, and accordingly the covenant, if he sought to break it, could be enforced against him at the instance and on behalf of the covenantee.

Now that being, in my opinion, the position of the squatter before he has acquired a statutory right under the Statute of Limitations, let me consider what would be the position of a squatter after a twelve years' occupation under the statute. By that occupation he has no doubt acquired a statutory title as against the covenantor or the heirs or assigns of the land of the

covenantor who during those twelve years has, or have been, so remiss as not to eject him; but he does not thereby of necessity become entitled to hold the land free from the obligation of the negative covenant. That obligation is one existing against the title of the true owner of the land. The right of the true owner to the land has, no doubt, gone as against the successful squatter, who has acquired a title against him under the statute, but the original equitable right of the covenantee still exists. It was not a right that could be barred by the operation of the Statute of Limitations in favour of the statutory squatting owner. The covenantee was not an assign of the land, or of any part of the land, or of any estate in the land, which was capable of being barred by the operation of the Statute of Limitations; nor was the covenantor a trustee, in any sense, of the land for the covenantee, or of any part of it, or of any estate in it. The covenantee could not, directly or indirectly, by any person representing him and his right, in respect of that right under the restrictive covenant, take proceedings to recover possession against the squatter during the twelve years; and, in the case I am considering, the covenantee would, in my opinion, be no more barred by the operation of the Statute of Limitations by not taking proceedings against the squatter during the twelve years than he would have been barred by not taking proceedings against the true owner, had that true owner remained in possession during that period.

There is a fallacy, as it appears to me, in the argument of the appellant, and I think it is this: the argument seems to assume that the statutory owner becomes, at the end of the statutory period of limitation, in the same position as if he had ousted by statutory title all the prior owners of the estate so as to destroy all negative covenants validly created by them. That is not so. If A., being really entitled to land, ousts by his superior good title one B. who has created restrictive covenants, or purported to create them, at a time when B.'s title was bad as against A., then, of course, when A. recovers possession, he is not bound by the restrictive covenants, for they were not originally validly created as against him, A.; but if A. is admittedly the true owner in fee in possession of the land at

C. A. 1906

NISBET AND POTTS' CONTRACT *In re.*

Romer L.J.

the time when he enters into valid restrictive covenants binding the land in equity, then a subsequent squatter, even when he ultimately by twelve years' occupation becomes entitled to the land as against A. or his heirs or assigns, cannot be heard to say that A. had no right to enter into the covenants originally, or that those covenants never had any validity as against him, the squatter, or ceased to have validity directly the twelve years elapsed. And certainly that squatter, who, if he did not know of the restrictive covenants validly entered into by the true owner, at best could only say that he did not know of them because he made no inquiry as to the title before he squatted, cannot say that he is in the position of a purchaser, as it were, of the land for value without notice. So to hold would, in my opinion, be most unjust towards the covenantee, and would lead to most undesirable consequences affecting many estates in this country now usefully regulated by such restrictive covenants as I am now considering.

Now, that being so, it remains to be considered whether in the present case, the vendor, or the vendor to him, was a purchaser for value without notice. In my opinion, if a purchaser chooses, either by agreement with his vendor or otherwise, to take less than a forty years' title, he cannot by so restricting his investigation, and by not inquiring into the title for the full period of forty years, say that he is not affected with notice of such equities affecting the land as he would have ascertained by reasonable inquiries into the title for the earlier part of the forty years.

The appellant seems to contend that where a vendor has acquired a title merely by possession under the Statute of Limitations, such a case is to be treated as an exception to the rule I have indicated, and that a trespasser who has acquired a good title by successful trespass for twelve years or more is not bound, or should be treated as not being bound, to make any inquiries whatever as to the earlier title, and should be treated as if he were in the position of a person purchasing and taking a proper title. I cannot agree with that contention of the appellant. I cannot see why a successful trespasser for twelve years, or a purchaser from him, should be placed in a better

position than an ordinary owner or vendor, or a purchaser from such ordinary vendor. I do not see that he is entitled to be regarded as being in any peculiarly favoured position. That being so, in the present case neither the present vendor, nor the vendor to him, can say he was a purchaser without notice. If the present vendor, or his vendor, had insisted on a proper title in regard to length being given to him, or had made proper inquiries into that title, it is clear that he must have ascertained the existence of the negative covenants in question. It certainly is, in my opinion, for the vendor in this case to prove the plea of purchaser for value without notice on his behalf, or on behalf of the vendor to him; but he has not discharged the onus so cast upon him. For these reasons I think the appeal fails.

COZENS-HARDY L.J. I am of the same opinion, and I so entirely agree with all that was said by Farwell J. in his judgment, and with the judgments of the Master of the Rolls and Romer L.J., that I almost doubt whether I ought to occupy even a few minutes of the time of the Court; but, having regard to the great importance of the case, perhaps it is right that I should add a few words.

Now, the suggestion which is at the root of the appellant's argument is this, that a squatter can wholly disregard restrictive covenants affecting a building estate. That is so startling a proposition, and so wide-reaching, that it must be wrong. The value of estates in the neighbourhood of London and all large towns, and the amenity of those estates, depend almost entirely upon the continuance of the mutual restrictive covenants affecting the user and the enjoyment of the property; and when we are told that the squatter, notwithstanding that he is a mere trespasser, is to be in a better position than that occupied by a person deriving a title strictly through the original covenantor, one feels that there must be an answer to the argument; and I think the authorities, when carefully examined, make the answer quite plain. The benefit of a restrictive covenant of this kind is a paramount right in the nature of a negative easement not in any way capable of being affected by the

C. A. 1906

NISBET AND POTTS' CONTRACT, *In re.*

Cozens-Hardy L.J.

provisions of the Statute of Limitations on which the squatter relies. The only rights extinguished for the benefit of the squatter under s. 34 are those of persons who might, during the statutory period, have brought, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant like this never had any cause of action which he could have brought, because unless and until there is a breach, or a threatened breach, of such a covenant, it is impossible for the person entitled to the benefit of it to bring any action. It appears, therefore, so far as the squatter himself is concerned, that both during the currency of the twelve years and after the expiration of the twelve years, there could be no possible answer to the claim of anyone seeking to enforce the covenant. In fact, there would, so far as he is concerned, be no difference between this covenant, which is in the nature of an equitable easement, and a legal easement strictly and properly so called. But although the squatter took the property subject to this equitable burden, it may be that the present vendor, who purchased from or through the squatter, is able to say that the burden does not affect the property in his hands. But what must he prove in order to claim this exemption? He must prove that he is a purchaser for value of the legal estate without notice. If in the old days he had simply pleaded "I am a purchaser for value," such a plea would have been demurrable; he would have had to go further and allege and prove that he was a purchaser for value without notice, and he must do the same at the present day. Now, can the present vendor allege and prove that he was a purchaser for value without notice? I think not. It is not necessary, of course, to prove actual notice; that has not been contended. But if a purchaser chooses to take a title without making full inquiries, he cannot be allowed to say that he had no notice of that which a full abstract would have disclosed. On this point the observations of North J. in *In re Cox and Neve's Contract* (1), and the passages from his judgment which have been referred to, are so much in point that I may venture to read them. He says (2): "I must say that I dissent entirely from the proposition that the purchaser would have taken

(1) [1891] 2 Ch. 109. (2) [1891] 2 Ch. 117.

the property free from the restrictive covenant, if he had made no inquiry. On the contrary, I think he would have been bound by it, and for this reason. He had agreed by the bargain contained in the conditions of sale to accept a title of less than forty years. That cannot relieve him from all knowledge of the prior title, or, it would come to this,—that, if a man was content to purchase property on the condition that he should not inquire into the title, he would acquire a title free from any existing restrictions, and would not have constructive notice of any incumbrance."

Of course, the law does not permit of anything so absurd as that, and I should be sorry to think that there could be any real doubt upon the subject. In the case of a lessee the law has gone possibly one step further, because in *Patman* v. *Harland* (1) it has been held, and so far as I know it has never been questioned, that a lessee is affected with notice of any restrictive covenants the existence of which he would have learned if he had investigated the lessor's title, even though, since the Vendor and Purchaser Act, 1874, the lessee is not entitled, under an open contract for a lease, to require the production of the lessor's title. As Sir George Jessel in that case said, that alteration of the law did not really prevent or interfere with the application of *Tulk* v. *Moxhay*. (2) If the lessee wanted to escape from that obligation, he, in agreeing to take the lease, should have required the production of the lessor's title. So that the doctrine has been extended, and I venture to think properly extended, not merely to a case where a purchaser under an open contract would be affected with notice of a document forming part of the chain of title, but also, at least in the case of a lease, to a case where a purchaser under an open contract would not be entitled to require production of the documents which alone could give him notice. I think that a squatter, who has been in possession for more than twelve years, is certainly in no better position than any other person. He cannot make a good title without delivering an abstract extending over the full period; and if the purchaser is willing to take a title depending upon the Statute of Limitations and the effect of s. 34, he must take such title subject to the

(1) 17 Ch. D. 353. (2) 2 Ph. 774.

C. A. 1906 — NISBET AND POTTS' CONTRACT, *In re.* — Cozens-Hardy L.J.

equitable burden, as it is often called by analogy to *Tulk* v. *Moxhay* (1), except in so far as it can be shewn that the equitable burden has been got rid of by means of a purchaser for value without notice.

For these reasons I think the appeal fails and must be dismissed with costs.

Solicitors: *Harris, Chetham & Cohen; Coleman, Betts & Howard.*

G. I. F. C.

C. A. 1906 *Feb.* 5, 6.

In re JACKSON AND HADEN'S CONTRACT.

[1905 J. 2.]

Vendor and Purchaser—Conditions of Sale—Right to Rescind if Objection insisted on—Misdescription—Absence of Title to Mines—Compensation.

A condition giving the vendor the right to rescind in the event of his unwillingness to comply with an objection to the title, must not be considered as giving him an arbitrary power to annul the contract; some reasonable ground for his unwillingness must be shewn. Before a vendor will be allowed to rescind, he must satisfy the Court that he entered into the contract in ignorance of some material fact or document, or under some mistaken notion that he was entitled to sell and could make a title; there must be no failure of duty on his part, no element of shortcoming, and he must have omitted nothing which the ordinarily prudent man, having regard to his contractual relations with other persons, is bound to do.

J. and others contracted to sell to H. a villa residence by a description wide enough to include the mines and minerals under it. The contract provided (clause 13) that if the purchaser should "insist on any objection or requisition as to title" which the vendors should "be unable . . . . or decline" to comply with, the vendors might rescind the contract; and (clause 14) that any error or misstatement should form the subject of compensation. The vendors believed that it was well known in the district that the minerals were reserved. The purchaser having insisted on a requisition that the vendors' title to the minerals should be furnished, the vendors gave a notice purporting to rescind the contract under clause 13:—

Held (affirming the decision of Buckley J., [1905] 1 Ch. 603, though on a different ground), that though the purchaser's objection was "an objection to the title" within the terms of clause 13, it was not an objection that the vendors could avail themselves of as a ground for

---

(1) 2 Ph. 774.

rescinding the contract, having regard to the facts and their own conduct; and that the purchaser was entitled, under clause 14, to a conveyance of the property with compensation in respect of the mines and minerals.

Bowman v. *Hyland*, (1878) 8 Ch. D. 588, discussed and explained.

APPEAL from Buckley J. (1)

This was a summons under the Vendor and Purchaser Act, 1874, which raised the question of the vendors' right to enforce a rescission clause in the contract. The facts are fully stated in the report below, but the following restatement of them and the material clauses of the contract is necessary to make this report intelligible.

By a contract of October 25, 1904, David Jackson and others agreed to sell to H. J. Haden for 510*l.* a villa residence at Dawley Brook, Kingswinford, in the county of Stafford, then in Haden's occupation, by a description wide enough to include the mines and minerals under it.

The material clauses of the contract were as follows :—

"13. . . . . If the purchaser shall insist on any objection or requisition as to title or evidence of title which the vendors shall be unable, or, on the ground of expense, shall decline to remove or comply with, then, notwithstanding any intermediate or pending negotiation, or any litigation which the purchaser may have commenced, or any attempt to remove or comply with such objection or requisition, the vendors shall be at liberty, by notice in writing, signed by them or their solicitor, and delivered to the purchaser or his solicitor, to rescind the contract. . . . . Upon such rescission the purchaser shall be entitled to receive back his deposit money, but without interest, costs, or other compensation, except costs of suit allowed by the Court in any litigation."

"14. Any error, misstatement, or omission in the particulars shall not annul the sale, but if pointed out before the completion of the purchase, and not otherwise, shall form the subject of compensation, which shall be allowed by the vendors or purchaser as the case may require. . . . ."

The abstract delivered by the vendors shewed that the mines

(1) [1905] 1 Ch. 603.

C. A. 1906 — JACKSON AND HADEN'S CONTRACT, *In re.*

and minerals under the property had been reserved to the grantor in a conveyance of 1854, under which the vendors derived title. On the purchaser demanding a supplemental abstract of the title to the mines and minerals, the vendors' reply was: "The purchaser is bound by the contents of the deed of 1854. It is also well known, and was known to the purchaser, that the mines and minerals are all reserved in the Kingswinford property." As a fact, the purchaser did not know that the mines under the villa were reserved, and he did know that mines under some part of Kingswinford property were not reserved.

As the purchaser repeated and insisted on his requisition for an abstract of the title to the mines, the vendors in December, 1904, gave notice in writing purporting to rescind the contract under clause 13 of the contract. The purchaser then took out the present summons, on the hearing of which Buckley J. decided that clause 13 did not apply so as to enable the vendors to rescind, and that under clause 14 the purchaser was entitled to a conveyance, with compensation in respect of the mines and minerals.

The vendors appealed.

Mark Romer, for the vendors. *Bowman* v. *Hyland* (1) was relied on by Buckley J. as a decision that a condition like clause 13 has no application where, as in the case of the mines and minerals here, the vendor has no title at all; but an objection that no title has been shewn to mines and minerals is, in fact, "an objection as to title" within the condition. To hold otherwise would lead to this singular result, that if the present objection is not an "objection" within the condition, the purchaser must be taken to have accepted the title, when there is according to him no title. *Bowman* v. *Hyland* (1) only applies where a vendor has no title at all to any part of the property he has contracted to sell, or where there has been a want of honesty on his part.

This case is covered by *Heppenstall* v. *Hose* (2), where a vendor who could shew title to a part only of the land contracted to be sold was allowed to avail himself of a condition to rescind. And so in *Re Ramuz and Edwards' Contract.* (3)

(1) 8 Ch. D. 588. (2) (1884) 51 L. T. 589.
(3) (1893) 37 Sol. J. 701.

There has been no mala fides on the part of the vendors disentitling them to avail themselves of this condition. The simple fact is that in the case of property in Kingswinford, a great mineral district, the surface is usually sold separately from the minerals, and the vendors, being under the impression that the purchaser was aware of the custom, unwittingly contracted to sell this small plot of ground, with the villa residence upon it, without any express reservation of the minerals. The minerals under this small plot cannot possibly be of any value to the purchaser, while to make a title to them would probably involve the vendors in a long and expensive inquiry. The case is, therefore, clearly one in which the right of rescission may be exercised. Condition 14, as to compensation for any error, misstatement, or omission in the particulars, does not interfere with the vendors' right to rescind under condition 13: *Mawson* v. *Fletcher* (1); *Ashburner* v. *Sewell.* (2) In *In re Deighton and Harris's Contract* (3) the Court of Appeal explained *Bowman* v. *Hyland* (4) by pointing out that in that case the vendors had no title at all, and, moreover, that it was not an honest case.

[*Astbury, K.C.*, for the purchaser. The minerals in the district have been worked up to within 300 yards of this property, and the purchaser naturally wishes to be protected against the letting-down of his house.]

Then that raises the question whether the purchaser is entitled to a right of support—that is, to the easement of a right of support. That is undoubtedly a question of title, just as in the case of an easement of a right of way, and clearly entitles the vendors to rescind if they are unable or unwilling to make a title to such an easement.

Astbury, K.C., and *Whitmore Richards*, for the purchaser. Condition 13 has no relation to the minerals at all. The contract being referable only to one property, the surface, it cannot be treated as referable to another property, the minerals. Conditions of sale must be construed most strictly against the person making them: *Greaves* v. *Wilson.* (5) The vendors must be taken

(1) (1870) L. R. 6 Ch. 91.
(2) [1891] 3 Ch. 405.
(3) [1898] 1 Ch. 458, 461–3.
(4) 8 Ch. D. 588.
(5) (1858) 25 Beav. 290, 293.

C. A. 1906 — JACKSON AND HADEN'S CONTRACT, *In re.*

to have intended to sell the property mentioned in their particulars. They knew that the mines were usually reserved in sales in this district, yet they did not take the trouble to make the reservation. They must, therefore, be taken to have known that this condition had no application to "mines and minerals."

The cases shew that a vendor does not by a condition of this kind acquire an arbitrary power of rescinding the contract. In all cases in which rescission has been allowed some reasonable ground for the vendor's unwillingness to carry out his contract has been proved, or the contract has been entered into in ignorance of some defect in the title, or on the faith of some promise or representation by third parties that they would concur in the sale, or something of that kind. The knowledge of the vendor of the state of his title at the time he entered into the contract is the most material element in all these cases.

The case is arguable on two grounds, either on a question of title or on the question of parcels. As a question of title, then this is a case where the vendors never had any title to these mines and minerals at all, a fact that was well known at the date of the contract, and *Bowman* v. *Hyland* (1) shews that a vendor cannot rescind when he has failed to shew any title at all. *Nelthorpe* v. *Holgate* (2) is in our favour, and is an instance of the importance to be attached to facts known to the vendor at the time of the contract.

[ROMER L.J. referred to *Duddell* v. *Simpson*. (3)]

In that case the vendor could make a title to substantially the whole of the property: three days only were outstanding.

[ROMER L.J. The vendor's inability to comply with the purchaser's objection was held not to disentitle him to the benefit of the rescission clause.]

The vendors here knew they had no title to the mines and minerals, and therefore cannot now honestly take advantage of this condition.

[COZENS-HARDY L.J. The argument that an objection to the title to the mines and minerals is not "an objection to title"

(1) 8 Ch. D. 588. (2) (1844) 1 Coll. 203.
(3) (1866) L. R. 2 Ch. 102.

is disposed of by *Upperton* v. *Nickolson* (1), where it was held that an objection of that kind was fatal to the title.]

It is not necessary for the purposes of this appeal to rely on that argument; the conduct and knowledge of the vendors at the time of the contract and the unreasonableness of the present rescission are the main points on which we rely.

That these rescission clauses were not to be used in cases like the present is clear from *Powell* v. *Powell* (2), *Heppenstall* v. *Hose* (3), *In re Deighton and Harris's Contract* (4), and *Greaves* v. *Wilson* (5), where the general effect of these clauses is considered.

Next, taking this as a question of parcels, on the construction of this contract, clause 14 ought to apply rather than clause 13. If it is a question of parcels the vendor cannot disregard his contract and rescind, when clause 14, giving compensation, clearly applies, and was intended to apply. In *Ashburner* v. *Sewell* (6) the defect was equally one of parcels as well as of title, though the decision turned on the objection to title. It is of no consequence that these clauses overlap. Clause 13 here is much narrower than the more modern and usual forms given in Key and Elphinstone's Conveyancing, 8th ed. vol. i. p. 254, and Davidson's Conveyancing, 5th ed. vol. i. p. 522: objection is confined to "title or evidence of title."

[Webster on Conditions of Sale, 2nd ed. p. 331, and *Painter* v. *Newby* (7) were also referred to.]

Mark Romer, in reply. Condition 13 is applicable to the present case, and there is nothing inequitable in the conduct of the vendors which prevents them from availing themselves of it. There is no inconsistency in these two conditions; clause 14 only provides for what is to happen in the event of the contract being completed. *Ashburner* v. *Sewell* (6) is precisely in point, and shews, too, that a condition as to compensation does not prevent the vendor from putting in force the right to rescind given him by the rescission condition. A vendor may rescind although the point objected to falls within the condition as to

(1) (1871) L. R. 6 Ch. 436, 444.
(2) (1875) L. R. 19 Eq. 422.
(3) 51 L. T. 589.
(4) [1898] 1 Ch. 458, 461–3.
(5) 25 Beav. 290, 293.
(6) [1891] 3 Ch. 405.
(7) (1853) 11 Hare, 26.

C. A. 1906 — JACKSON AND HADEN'S CONTRACT, *In re.*

compensation : Dart's Vendors and Purchasers, 7th ed. p. 178. Even with a compensation condition a vendor may find himself in a very difficult position, and may be obliged, for his own protection, to have recourse to the rescission clause. It is to meet difficulties of this kind that the clause is always inserted; and it is not correct to say that a rescission clause only applies to defects contemplated by the vendor. Assuming that the present is an objection to title which the vendors are unable or decline to remove, then they are entitled to rescind, and there are no circumstances here which make it inequitable or dishonest to take advantage of this clause. It was well known in this neighbourhood that the mines and minerals were reserved. In *Duddell* v. *Simpson* (1) there was a clear misdescription, though not a wilful misdescription, and yet rescission was allowed and there was a misdescription in *Ashburner* v. *Sewell.* (2)

[COZENS-HARDY L.J. You knew you had no title to the minerals, yet you chose to run the risk of the purchaser being aware of this fact or raising no objection.]

These vendors ran no more risk than the risk that was taken in *Duddell* v. *Simpson.* (1) They acted quite honestly; they believed the purchaser knew the minerals were reserved. In *Re Ramuz and Edwards' Contract* (3) the vendor had actually sold one of the four plots, and yet he was allowed to rescind.

COLLINS M.R., after stating the nature of the application and the facts, and having read clauses 13 and 14, continued :—

The case has been exceedingly well argued, everything has been said that could be said, and every case has been brought to our attention which could usefully be referred to in support of the argument, and I have come to the conclusion that this appeal fails. Buckley J. has based his judgment, in the first instance, on *Bowman* v. *Hyland* (4), which decided that a condition like this is not one which applies to a case where a vendor has no title at all; and he held that this was really not an objection addressed to title—that, on the authority of that case, it must not be deemed to be a condition applicable to a case

(1) L. R. 2 Ch. 102.
(2) [1891] 3 Ch. 405.
(3) 37 Sol. J. 701.
(4) 8 Ch. D. 588.

where the vendor, in point of fact, had no title. It seems to me that there are some difficulties in applying the decision of Hall V.-C. in *Bowman* v. *Hyland* (1) to this particular case, because this is not a case where the vendor had no title: these vendors had a title to the greater part of the subject-matter which they purported to sell; the failure of title was as to a part only. Therefore, it does not appear to me that *Bowman* v. *Hyland* (1) is directly in point to the extent to which Buckley J. applied it; and it seems to me that this case may well be rested on a broader ground. Though in my opinion this particular condition, on the face of it, might apply to the particular failure of title which arises in this case, and that the objection raised by this purchaser is an objection addressed to title, nevertheless it does seem to me that, within the principle of the cases which have been cited, it is not an objection that the vendors, on this contract, can avail themselves of as justifying them in rescinding this contract. Now, it is to be noted that, in dealing with this right to rescind, the learned judges have always criticized most carefully the conduct of the parties to the contract, and the purpose for which the particular condition must be supposed to have been introduced, with a view to seeing whether or not it is, in the circumstances of the particular case, a condition that ought to be applied for the benefit of the person who has introduced it. In this particular case, there is no doubt that this clause was introduced for the benefit of the vendors. The Court considers whether or not the vendor has so acted in the matter as to be entitled to avail himself of that condition; or it may be put in other words. Can we construe this condition, in the circumstances, as applying to the particular state of facts which has caused the difficulty?

There are some very valuable observations of Turner L.J. in a case which has been referred to of *Duddell* v. *Simpson* (2); he deals there broadly with the circumstances under which the Court will allow a vendor to take advantage of a condition like the present one. He says (3), dealing with the meaning of unwillingness in conditions of this kind: "I only refer,

(1) 8 Ch. D. 588. (2) L. R. 2 Ch. 102.
(3) L. R. 2 Ch. 107.

C. A. 1906 — JACKSON AND HADEN'S CONTRACT, *In re.* — Collins M.R.

therefore, to the question of unwillingness because several cases bearing upon it have been cited before us. Those cases have settled, and, I think, very wisely settled, that the word 'unwilling,' in a condition of sale of this description, is not to be considered as giving an arbitrary power to the vendor to annul the contract. I think that in a case where the vendor annuls the contract on the ground of unwillingness, he must shew some reasonable ground for unwillingness; thus, for instance, he may shew that if he proceeds to comply with a requisition, he will be involved in expenses far beyond what he ever contemplated, or be involved in litigation and expenses which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract. But to say that a vendor, upon a condition of that description, could annul a contract brevi manu, without attempting to answer any of the requisitions that are made on the part of the purchaser, would be opposed both to principle and authority; for that would, in truth, be giving to the vendor the power of saying that that which was intended as a sale, and was a sale, shall, in truth, be no sale at all." That case, and another one that has been cited, very clearly bring out the exact line of difference between the cases in which the Court will allow the vendor to avail himself of such a condition and those where it will not. In *Duddell* v. *Simpson* (1) what happened was this. A vendor entitled to an underlease for a term of twenty-four years less three days, put up the property for sale as held under a lease for twenty-four years, relying on the promise of the persons entitled to the three days to concur: they afterwards refused to concur, and the Court of Appeal held that the vendor could not be considered to have made a misrepresentation so as to disentitle him to the benefit of the rescission clause. The vendor in that case, therefore, had taken steps to assure himself, and was thoroughly satisfied that he should be in a position to make a complete title to that which he purported to sell. The other case, which I think contrasts with that, and brings out the distinction I have in my mind, is *Nelthorpe* v. *Holgate*. (2) In that case a vendor contracted to sell an estate in fee, with a stipulation that if any dispute should

(1) L. R. 2 Ch. 102. (2) 1 Coll. 203.

arise as to the title the same should be submitted to some eminent conveyancer, and if he should be of opinion that a good title could not be made, the contract should be rescinded. Upon the delivery of the abstract it appeared that the vendor's mother had a life interest in the premises, and that her interest was known to the vendor at the time of the contract. Upon her refusing to join in the conveyance to the purchaser, Knight Bruce V.-C. held that the vendor was not entitled to rely on the before-mentioned stipulation as a ground for rescinding the contract, but that the contract must be specifically performed with compensation. The Vice-Chancellor says this (1): "If, indeed, Mr. Holgate had satisfied the Court, that he entered into the contract of March in ignorance of his mother's life estate, or under a mistaken notion, that he was entitled to sell and could make a title to the fee simple in possession without her concurrence, or in consequence of any promise or representation on her part, that she would concur in the sale; or, if he had shewn, that, when the agreement was made, either Mr. Holmes, Mr. Grantham, or Sir John Nelthorpe knew, or had, as between them and Mr. Holgate, notice, of Mrs. Holgate's interest or her son's inability to make a title without her consent, the case would have been different, and might, possibly, have been materially different from its present position."

Now, what is the element that the Vice-Chancellor is seeking for there which determines the case? It seems to me to be an element of something on the part of the vendor less than the law requires of him in such cases. It may stop short of fraud, it may be consistent with honesty: but, at the same time, there must be a falling short on his part—he must have done less than an ordinarily prudent man, having regard to his relations to another person, when dealing with him, is bound to do; and therefore where, knowing the exact facts, he has recklessly made a description of them which would mislead another person who did not know as much as himself (even though he thought that person might know as much as himself), there is a clear failure of duty on the part of the vendor which fairly disentitles him to say that a clause introduced into the contract for his

(1) 1 Coll. 222.

C. A. 1906 JACKSON AND HADEN'S CONTRACT, *In re.* Collins M.R.

benefit is introduced to meet such a case as that which has arisen here, namely, a reckless disregard by the vendor of his duty as to accuracy of statement when he is making a statement with a view to other people acting on it as correct. On that ground it is enough to say that this particular condition must be read (as against the persons who are taken to have introduced it and introduced it for their own benefit) as not applying to the particular case to which they seek to apply it, namely something arising wholly and solely out of their own recklessness in the manner in which they have formulated the contract.

As I have already said, numerous cases have been most carefully set before us, which I have had the opportunity of examining as they were read, and it seems to me that, in every case where the vendor was allowed to avail himself of a stipulation like this, there was always absent that element of shortcoming on his part which, though falling short of fraud or dishonesty, might be described as "recklessness." The distinction is well put in the two cases that I have just read; but in none of the cases in which the vendor was allowed to avail himself of that condition was there anything which could be really imputed to the vendor as at all in the nature even of recklessness, much less of fraud or dishonesty.

That appears to me to be a broad ground which displaces clause 13 and debars the vendors from taking advantage of it; and, if that is so, we then fall back upon clause 14 to see whether it applies.

In the view that I take of this case, it is not necessary to consider whether these two clauses may be taken as overlapping, or whether the fact that the particular case is provided for in special terms by one clause excludes it from the operation of the other the terms of which are not so special. That need not, I think, be considered, though there is the authority of Chitty J. in *Ashburner* v. *Sewell* (1), which has been adopted by other judges, that these two clauses may overlap. But it seems to me that here, even if they do overlap, for the reasons I have given the bearing of the first of the two clauses is displaced, and the case is governed by the second, which in terms applies;

(1) [1891] 3 Ch. 405.

because that this is a misstatement or omission seems to me to be perfectly clear. It might perhaps be suggested that this statement or misdescription is of so formidable a character as to practically amount to a complete failure to carry out the contract, and to be beyond the purview of a clause dealing with compensation as distinguished from rescission. That point, however, has not been taken or pressed here, and it seems to me that the misstatement or omission falls within clause 14, and consequently that the decision of Buckley J. upon this part of the case was perfectly right.

I have already remarked on the terms in which Buckley J. has dealt with the decision of *Bowman* v. *Hyland*. (1) It may be merely a difficulty of language, and not of meaning. I think that the true effect of the decision in *Bowman* v. *Hyland* (1) is that, though the objection was an objection to title, the rescission clause was not applicable, in the particular case, to the particular difficulty which had arisen, and it could not be applied to shelter the vendor in the circumstances. I do not think that the decision of Buckley J. really involves the point that an objection of this kind is not an objection to title. I think his decision only goes to this, that clause 13 is not available for these vendors in the particular circumstances of the particular case. In my opinion, therefore, notwithstanding the very able argument which has been addressed to us on the part of the appellants, I think that the decision of Buckley J. must be affirmed, and that this appeal must be dismissed.

Romer L.J. I also think that this appeal fails, though I must not be understood as assenting to all the observations made by the learned judge in his decision in the Court below. I can state my grounds for saying that this appeal fails very shortly, for they depend upon the special and peculiar circumstances of the case, and I do not think it is necessary to deal with the numerous interesting points and cases which have been dealt with in the course of the arguments.

The vendors' case is that they knew they had no title to the minerals, and that they never claimed them and never intended

(1) 8 Ch. D. 588.

C. A. 1906 — JACKSON AND HADEN'S CONTRACT, *In re.* — Romer L.J.

to sell them. Unfortunately for them they described the property in this contract in such a way as to include the minerals. Their case is simply that they were guilty of a misdescription as to what they had to sell, thinking, erroneously, that the purchaser would not be misled. Now, to such a case of misdescription undoubtedly, and admittedly almost I may say, clause 14 of the contract applies. Then the question arises, under those circumstances can the vendors avail themselves of clause 13 with reference to questions of title so as to rescind the contract? I think they cannot, under the circumstances. I do not think that, so far as concerns these vendors, they can be heard to say that clause 13 applies to such a case. As regards them, under the circumstances, I think the difficulty that has arisen is not really a matter of title, though it would have been a matter of title as between an ordinary vendor and purchaser. As Rigby L.J. said in the case of *In re Deighton and Harris's Contract* (1) with reference to the case that he had to deal with, it would not, in my opinion, be right here to enable the vendor to "ride off upon a condition to rescind which was obviously not framed with reference to any such case as" that which has arisen.

On these grounds I think the appeal fails.

COZENS-HARDY L.J. I am of the same opinion. Like the Master of the Rolls, I desire to say that I feel much indebted to counsel for the very able manner in which this difficult case has been argued, but upon the whole, on the consideration of all the arguments, I have come to the conclusion that the decision arrived at by Buckley J. was correct. At the same time, I desire to guard myself from being supposed to assent to one or two remarks of that learned judge, in particular where he says that you cannot take an objection to that which has no existence, and that there is an obvious difference between an objection to a vendor's title as being imperfect and an objection that he has no title at all. It seems to me that an objection that the vendor has shewn no title at all to the whole or a part of the property which he has contracted to sell is just as much an

(1) [1898] 1 Ch. 464.

objection to title as would be an objection that the title shewn is imperfect and incomplete, and I think there is ample authority for that. The case of *Upperton* v. *Nickolson* (1), which I referred to in the course of the argument, seems to decide that an objection that the vendor has shewn no title to minerals which were reserved to the lord of the manor is an objection to title. I think, therefore, that, as a mere question of construction, clause 13 of this contract does apply to a case like the present. But having got thus far is not sufficient to enable the appellants to succeed; because there is the second question which we have to consider: assuming that the condition applies, is it one upon which the vendors are entitled to rely? And when we look at the authorities, and particularly the recent authorities in the Court of Appeal, that is the way in which conditions of this kind have been dealt with, and ought to be dealt with, by the Court. It is not enough for the vendor to say: Here is a condition which, as a matter of construction, entitles me to rescind this contract. The answer is: No, you must look at all the circumstances; are they such as to entitle you to put an end to that contract of sale which, in form and in fact, you have entered into? *Bowman* v. *Hyland* (2), upon which so much reliance was placed, is justified and is made intelligible on that ground. It is so explained by Lindley M.R. in *In re Deighton and Harris's Contract.* (3) He says (4) that Hall V.-C. held, not that the condition in terms did not apply, but "that a vendor could not avail himself of such a condition where he had no title at all."

So, here, what are the facts? The vendors not merely had notice, or might have ascertained if they had investigated their title fully, but knew that these minerals were reserved, and were not theirs to sell: they then put the property up for sale in terms which include the minerals, and they took upon themselves the risk of the purchaser's knowledge of that which was inconsistent with the terms of the written contract.

Now, under those circumstances, is it just, is it reasonable, that they should be allowed to put an end to the contract

(1) L. R. 6 Ch. 436.
(2) 8 Ch. D. 588.
(3) [1898] 1 Ch. 458.
(4) Ibid. 463.

C. A. 1906 — JACKSON AND HADEN'S CONTRACT, *In re.* — Cozens-Hardy L.J.

under clause 13 and say that the purchaser is not entitled to the benefit of clause 14, which, standing alone, would plainly entitle him to compensation in respect of this misdescription?

For the reasons which have been given by the Master of the Rolls and Romer L.J. I think that question must be answered in the negative. I think that clause 14 is the one which is applicable, and that, under the circumstances of this case, it is not reasonable or just that the vendors should be allowed to rescind under clause 13.

Solicitors: *Robbins, Billing & Co., for W. Waldron, Brierley Hill, Staffordshire; A.E. Bale, for Harwards & Co., Stourbridge.*

W. C. D.

KEKEWICH J. 1906 — *Jan.* 30.

HOLLIWELL *v.* SEACOMBE.

[1903 H. 2513.]

Vendor and Purchaser—Recission—Sale under Direction of Court—Discharge of Purchaser from Contract—Vendor's Power to Rescind—Misrepresentation—Costs recoverable by Purchaser—Costs of Bidding.

Where land is contracted to be sold subject to a condition empowering the vendor to rescind the contract in the event of the purchaser making any requisition which the vendor is advised not to comply with, and stipulating that the return of the deposit shall be accepted by the purchaser in discharge of all claims for costs or otherwise, and the Court accedes to an application by the purchaser to be discharged from his contract on the ground of misrepresentation, the vendor cannot avail himself of his power to rescind under the contract; and where the sale is under the direction of the Court the costs recoverable by the purchaser include, besides the costs of investigating the title and of the application, the costs occasioned by his bidding for and becoming the purchaser of the property.

This was a summons taken out in a partition action by the purchaser of certain property sold under the direction of the Court, asking that he might be discharged from his purchase.

At a sale by auction of certain property in Tunbridge Wells, held on July 7, 1905, under an order of Kekewich J. made in the

action on January 25, 1905, the applicant became the purchaser of lot 6. Lot 6 was described in the particulars as "valuable freehold land . . . . immediately ripe for development as a building estate," and the description then continued as follows: "It commands a frontage of 100 feet to the road known as Culverdon Down Road, and offers an exceptional opportunity of acquiring freehold building land in a very healthy and populous part of the town, and affording a large area which can be utilized for the erection of numerous small class residences, for which there is an ever increasing demand in this particular locality."

The property was sold under conditions of sale, of which clause 7 provided as follows: "If any purchaser shall take any objection or make any requisition which the vendors are advised not to remove or comply with, or if any question should arise as to the conveyance, the vendors, with the sanction of the judge, shall be at liberty by notice in writing to be delivered to such purchaser or his solicitor, and notwithstanding any intermediate negotiation, to rescind his contract for sale upon such terms as the judge shall approve, and the purchaser whose contract is so rescinded shall thereupon be entitled to receive back his deposit, and shall accept the same in discharge of all claims for costs or otherwise, and shall forthwith return all abstracts and papers in his possession belonging to the vendors."

On perusal of the abstract it appeared that by an indenture dated July 29, 1887, the property in question was conveyed in fee simple to Edward Marchant Hunter, a predecessor in title of the vendors, subject to the covenants thereinafter contained, and the indenture contained a covenant by Hunter with the grantors that he, the said Edward Marchant Hunter, his executors, administrators and assigns would forthwith erect almshouses on the said piece of land and would not at any time use the said land, or the buildings to be erected thereon as aforesaid, or suffer the same to be used, for any purpose whatever otherwise than as almshouses for the poor.

The purchaser by his requisitions on title objected that this restrictive covenant would prevent the property being developed as a building estate, and upon the refusal of the vendors to remove this objection he took out this summons claiming—(1.) that

KEKEWICH J. 1906 HOLLIWELL v. SEACOMBE.

he might be discharged from being the purchaser of lot 6; (2.) a return of the deposit; (3.) taxation of his costs, charges and expenses occasioned by his bidding for and being allowed to be the purchaser of the property, and of the investigation of title, and of the application, and repayment of the same out of the funds in Court standing to the general credit of the action. Thereupon the vendors applied for leave to rescind their contract under condition 7. Leave was obtained and notice of rescission was served on the purchaser immediately before the purchaser's summons came on for hearing in chambers. The master on hearing the purchaser's summons thought that the words in condition 7, "upon such terms as the judge shall approve," gave him a discretion as to the costs to be paid to the purchaser, and held that the purchaser was entitled to the costs of bidding at the sale in addition to the other costs claimed by the summons, but the matter was referred to the judge, and was by him adjourned into Court.

P. O. Lawrence, K.C., and *Ribton*, for the purchaser. 1. If the purchaser makes out a case of misrepresentation in the particulars, entitling him to be discharged from his contract, that will vitiate the whole contract, including the vendors' power to rescind: *Flight* v. *Booth* (1); *In re Terry and White's Contract* (2); *In re Puckett and Smith's Contract.* (3) That there is a misrepresentation here is clear, since this land was described as building land and it is subject to a restrictive covenant which prevents the purchaser from using the land except for the purposes of almshouses. If there had been no misrepresentation the purchaser might still have brought an action for rescission by reason of the restrictive covenant, but that would not have barred the vendors' right to rescind: *Isaacs* v. *Towell.* (4) That decision does not apply to this case, and the only question is what costs can the purchaser recover. Where, on a sale by the Court, the purchaser is entitled to be discharged from his contract, the costs which he is entitled to recover include his costs of bidding and of becoming purchaser in

(1) (1834) 1 Bing. N.C. 370, 377.
(2) (1886) 32 Ch. D. 14, 29.
(3) [1902] 2 Ch. 258, 263.
(4) [1898] 2 Ch. 285.

addition to his other costs: *Powell* v. *Powell* (1); Seton's Judgments and Orders, 6th ed. vol. i. p. 356.

[KEKEWICH J. A similar order was made in *Perkins* v. *Ede*. (2)]

Else v. *Else* (3) shews that the Court will not allow the vendor to take advantage of the conditions where the purchaser has been deceived, especially in the case of a sale under the direction of the Court. (4)

2. Assuming that condition 7 applies, that condition provides that leave to rescind is to be granted upon such terms as the judge shall approve. It is submitted that the purchaser is entitled to be heard on that question and that he ought to be put in the same position as if there had been no contract.

Stewart-Smith, K.C., and *Holland Schwann*, for the vendors. There is no misrepresentation. The covenant does not bind the purchaser. It is a covenant to build almshouses and will create no liability against the assignee of the land. Further, the deed of 1887 was void under the Mortmain Acts, and a good title has now been acquired under the Statute of Limitations: *Magdalen Hospital* v. *Knotts*. (5) This covenant therefore cannot now be enforced by anyone, and the purchaser is bound by the contract whatever it may mean. As regards the meaning of condition 7, the purchaser is not entitled to be heard as to the terms on which leave to rescind shall be given. We do not dispute the right of the purchaser to his costs down to the date of the notice of rescission, but from that date he is entitled only to what the condition gives him: *Isaacs* v. *Towell* (6); *In re Spindler and*

(1) (1875) L. R. 19 Eq. 422, 425.

(2) (1852) 16 Beav. 268.

(3) (1872) L. R. 13 Eq. 196.

(4) The order in *Else* v. *Else*, after ordering that the applicant be discharged from being the purchaser of lots 1 and 2, and that the deposit be repaid to him, continued: "And it is hereby referred to the taxing master to tax the costs, charges and expenses of the applicant occasioned by his bidding and being allowed the purchaser of the said hereditaments." And it was ordered that so much of a certain sum of consols in Court standing to the credit of the action as would raise the said costs should be sold, and that out of the money to arise by such sale the said costs should be paid to the applicant's solicitors, or one of them (Chancery Orders A, 1872, p. 148).

(5) (1879) 4 App. Cas. 324.

(6) [1898] 2 Ch. 285.

KEKEWICH J. 1906 HOLLIWELL v. SEACOMBE.

Mear's Contract (1); *Duddell* v. *Simpson* (2); *In re Deighton and Harris's Contract.* (3)

Assuming it is held that the purchaser is entitled to costs outside the condition those costs ought to be limited to the costs of investigating title and ought not to include the costs of attending the sale: *Bain* v. *Fothergill.* (4) *Powell* v. *Powell* (5) and *Else* v. *Else* (6) are applicable only to a case where no title at all is shewn and not to a case where there is a defect in the title.

P. O. Lawrence, K.C., in reply. The restrictive part of the covenant affects the user of the land and is binding on any purchaser with notice according to the principle of *Tulk* v. *Moxhay.* (7)

KEKEWICH J. The application before me is one by the purchaser under a sale by the Court to be discharged from his purchase, and to be paid not only the costs of this application, but also the costs, charges and expenses occasioned by his bidding for and being allowed to become the purchaser of lot 6, as well as the costs of investigating the title.

It is admitted that he is entitled to be discharged unless that right has already been anticipated by rescission, and that he is entitled to his costs of investigating the title and of this application, but the question is whether he is entitled to the costs occasioned by his bidding at the sale. It is suggested that he is precluded from recovering these costs by *Bain* v. *Fothergill* (4), but the rule in that case has nothing to do with sales by the Court. The practice of the Court is perfectly well settled, though it is strange not to find it laid down in any of the text-books on the subject. The matter was discussed in *Powell* v. *Powell* (8), before Bacon V.-C. There the purchaser was entitled to be discharged, and the Vice-Chancellor says in his judgment: "This brings it to the ordinary case of a purchaser who, finding that he is entitled by law, on account of the invalidity of the proceedings

(1) [1901] 1 Ch. 908.
(2) (1866) L. R. 2 Ch. 102.
(3) [1898] 1 Ch. 458.
(4) (1874) L. R. 7 H. L. 158.
(5) L. R. 19 Eq. 422.
(6) L. R. 13 Eq. 196.
(7) (1848) 2 Ph. 774.
(8) L. R. 19 Eq. 425.

in chambers, to be discharged from his contract, is entitled on coming here to be reinstated in exactly the same position that he stood in when he attended the sale, and to be indemnified against all the expenses he has been put to." That is a rule laid down with reference only to sales by the Court and the discharge of purchasers under sales by the Court, and without citing authorities, some of which have been cited in argument, it is always recognized that it is the bounden duty of the Court to uphold a very high standard of conduct as regards sales by the Court—more so indeed than would be the case in a sale by a stranger out of court. The minute of the order in *Powell* v. *Powell* (1) is given in the report of that case, and it is set out in Seton, vol. i. p. 356, where the principle is worked out so as to be applicable also to a sale by private contract under the direction of the Court. Nothing else is there referred to but this case of *Powell* v. *Powell* (1), but in the course of the argument I lighted upon another case, *Perkins* v. *Ede* (2), where, on the discharge of the purchaser, Romilly M.R. contented himself with saying: "Take the usual order." One might have doubted what was the usual order but that the reporter has given the form of order together with a reference to the registrar's book in a footnote. It runs as follows: "Abstract of order. Discharge the purchaser and tax his costs, charges and expenses properly incurred, occasioned by his bidding for and becoming the purchaser of lot 3, and also his costs of the reference as to title, and of all proceedings consequent thereon, including his costs of and occasioned by the plaintiff's exceptions to the master's report and the order thereon, and of this application and consequent thereon; and direct payment out of the fund in court." That expressly gives to the purchaser the costs, charges and expenses occasioned by his bidding for and becoming the purchaser of the property in question. That was in 1852, and in 1875 Bacon V.-C. in *Powell* v. *Powell* (1) made the same order. There being nothing to shew that that has not been the practice from that time till now, I must take it that these two orders express the settled practice of the Court. Therefore, unless there is something to be said against it, it being admitted that this purchaser cannot

(1) L. R. 19 Eq. 422. (2) 16 Beav. 268.

KEKEWICH J. 1906 HOLLIWELL v. SEACOMBE.

be bound by this contract, I must hold that that practice applies to this case. The answer given to that is that this purchaser has purchased under a contract which precludes him from getting these costs. [His Lordship read clause 7 of the conditions of sale, and continued:—] There was a very similar clause in *Powell* v. *Powell* (1), and that did not there prevail to prevent the purchaser from getting the costs which the Vice-Chancellor held him entitled to, but in that case there was no notice to rescind, and here the argument on behalf of the vendors is that that notice having been given the purchaser cannot ask for any more than that which condition 7 gives him. That he is entitled to that, they admit, and also to some small costs of the summons incurred before the notice was given, but they contend that he is entitled to nothing more. Therefore I fall back on this—Does the 7th condition apply to this particular case? The purchaser says, "No, because I am seeking to get out of my contract on the ground of misrepresentation. If I am entitled on that ground to be discharged from my contract, I am discharged from condition 7 as well, and therefore I am not bound by its terms." For this purpose I do not think it matters much whether the summons was issued before or after the vendors' notice to rescind. It seems to me that if the purchaser is entitled to be discharged on the ground of misrepresentation, that right would not be affected by a notice to rescind under condition 7. If, on the other hand, he is not entitled to be discharged, the notice would prevent him from recovering more than the vendors chose to give him, notwithstanding that it was given after the summons was issued. As a matter of fact the summons was issued first. Therefore the question is whether the purchaser is entitled to be discharged on the ground of misrepresentation, and whether he is entitled to costs as in *Powell* v. *Powell*. (1) His point is this. Lot 6, of which he is the purchaser, is advertised as "valuable freehold land immediately ripe for development as a building estate . . . . affording a large area which can be utilized for the erection of numerous small class residences, for which there is an ever increasing demand in this particular locality." Whatever else that means, it means that this property is offered as

(1) L. R. 19 Eq. 422.

available building land. It is advertised as land on which the purchaser can, if he pleases, build residences. That is a perfectly clear result from that statement. Now, can that be done? In the abstract there is contained a deed of July 29, 1887, under which Mr. E. M. Hunter purchased this property in fee simple. That deed contains a covenant by Hunter that he, his executors, administrators and assigns will forthwith erect almshouses. That I pass by. That clearly is only a personal covenant by Hunter and is not enforceable against this purchaser. But then the covenant goes on in a negative form: "and will not at any time use the said land or the buildings to be erected thereon as aforesaid for any purpose whatever other than as almshouses for the poor"; in other words, will not build anything but almshouses on this land. That is a clear contradiction of the representation that this is building land and that the residences mentioned in the description can be erected thereon. But then it is said that this is a personal covenant. In one sense that is so, but according to the well-known doctrines of the Court it can be enforced against any person purchasing the land with notice, and there can be no question that an injunction to prevent this purchaser from erecting anything but almshouses would be granted. If that is so there is a direct representation that the ground can be used for building when in fact, to the knowledge of the vendors, it cannot be so used. Then it is objected that this constituted a charitable gift, and that the restriction is invalid, but I cannot see how a covenant not to build anything but almshouses is devoting land to charity in perpetuity. There is, therefore, a clear case of misrepresentation. That being so the notice to rescind appears to me to be entirely out of the question. Several cases have been cited on this point, but I content myself with what was said by Lindley L.J. in *In re Terry and White's Contract* (1): "However clear a contract may be in its language, it may be rescinded for fraud or material misrepresentation; and cases are reported in which contracts for the sale of land have been rescinded on this ground, although one of the conditions was that no error or misstatement should annul the sale, but should be the subject of compensation."

(1) 32 Ch. D. 14, 29.

KEKEWICH J. 1906 HOLLIWELL v. SEACOMBE.

That is analogous to the case which we have here, where there is a provision for rescission on certain terms. Then he adds this: "In such cases the fraud or misrepresentation, if sufficiently serious, vitiates the whole contract, including the condition in question." That is quite consistent with the other authorities. The purchaser is not bound to come in and say, "I will avoid on the terms of the condition, and will only take what the condition gives me," but is entitled to say, "I will avoid the contract, condition and all, and will have what the law gives me apart from the condition."

That really disposes of the case; but there is one point which has given rise to some discussion on which I think it better to express my opinion. This same condition provides that the vendors, with the sanction of the judge, may rescind their contract "upon such terms as the judge shall approve," and then the condition goes on to provide that "the purchaser whose contract is so rescinded shall thereupon be entitled to receive back his deposit, and shall accept the same in discharge of all claims for costs or otherwise." These words seem to me to state clearly and exhaustively what the purchaser's position will be—what he is entitled to receive on the rescission of his contract—and leave no room for discussion by him. But the vendors are to rescind upon such terms as the judge shall approve. Those terms have nothing whatever to do with the purchaser. If the vendors are advised that there is a difficulty about their title, they may apply to the Court and ask for leave to give notice to rescind. With that the purchaser has no concern. If the rescission is not fairly within the condition the purchaser may be entitled to enforce his contract. He has nothing to do with approving the terms on which the notice is to be given. I am not sure that those words were really wanted, but I think that they mean this: 'Sales under the direction of the Court are generally made in actions in which many parties are interested—such as debenture-holders' actions, creditors' administration actions, actions to determine priorities between successive mortgagees, and so forth. The conduct of the sale is always given to some one, and it may well be right that the Court should consider, on behalf of all the parties interested

in the sale, the terms on which the contract is to be rescinded. The Court will not allow the person who has the conduct of the sale to rescind if it is desirable in the interest of other parties to enforce the contract. But if the notice to rescind can only be given with the sanction of the judge, the judge would go into the matter fully, and would exercise his discretion in each case. Therefore I doubt myself if those words are of any value. But so far as they are, I think that they point to the consideration of other interests on the vendors' side, and that the purchaser has nothing to do with them.

There will be an order in the terms of the summons.

Solicitors: *E. Elvy Robb; Hare & Co., for Andrew & Cheale, Tunbridge Wells.*

H. B. H.

Applied. Re POWER'S SETTLEMENT TRUSTS. [1951] 1 All E.R. 932.

Approved. In re POWER'S SETTLEMENT [1951] Ch. 1074

In re SAMPSON. SAMPSON *v.* SAMPSON

[1905 S. 4122.]

Followed. In re POWER'S SETTLEMENT TRUSTS [1951] 1 Ch. 689

KEKEWICH J. 1906 *Jan.* 31.

Trustee—Appointment of New Trustee—Statutory Power—Power to appoint "another Person or other Persons"—Donee appointing Himself—Invalid Appointment—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 10, *sub-s.* 1.

Under the statutory power of appointing new trustees conferred by s. 10, sub-s. 1, of the Trustee Act, 1893, the person making the appointment cannot validly appoint himself, either alone or jointly with any other person.

Montefiore v. *Guedalla*, [1903] 2 Ch. 723, considered.

ADJOURNED SUMMONS.

By his will dated August 12, 1849, the testator, Joseph Sampson gave and bequeathed to his executors thereinafter named all his estate and effects, moneys, leasehold estates, securities for money, and all other his estate and effects whatsoever upon the trusts thereinafter declared, and the testator appointed his wife Elizabeth, his sons Joseph Sampson, John White Sampson, and Charles Sydney Sampson, executrix and executors of his will. The will contained no express power of appointing new trustees.

KEKEWICH J.

1906

SAMPSON, *In re.* SAMPSON *v.* SAMPSON.

The testator died on August 13, 1849, and his will was proved on October 11, 1849, by Elizabeth Sampson, Joseph Sampson and John White Sampson, power to prove being reserved to C. S. Sampson.

Elizabeth Sampson died in 1861, Joseph Sampson in 1875, and C. S. Sampson in 1897.

John White Sampson died on March 10, 1905, having by his will appointed executors, both of whom renounced probate. Letters of administration of his estate with the will annexed were on June 23, 1905, granted to the plaintiff, Elisha John Sampson.

By an indenture dated July 8, 1905, and made between the plaintiff E. J. Sampson of the one part, and the plaintiffs Albert Ernest Sampson and E. J. Sampson of the other part, the plaintiff E. J. Sampson purported, in exercise of the power for that purpose by the statute in that behalf given to him and of every or any other power enabling him in that behalf, to appoint the plaintiff A. E. Sampson and himself to be trustees of the testator's will in place of the said E. Sampson, J. Sampson, J. W. Sampson, and C. S. Sampson; and the plaintiff E. J. Sampson thereby declared that the plaintiff A. E. Sampson and he the said E. J. Sampson should stand possessed of the leasehold premises particularized in the schedule thereto upon the trusts and with and subject to the powers and provisions in the testator's will declared and contained. The indenture did not contain any vesting declaration by the plaintiff.

The validity of this appointment having been called in question, the plaintiffs took out this summons asking (inter alia) that it might be determined whether they had been duly appointed trustees of the will, and, if necessary, that their appointment as such trustees might be confirmed by the Court.

Austen-Cartmell, for the plaintiffs. The latest decision upon the question whether the donee of a power of appointing new trustees can validly appoint himself is that in *Montefiore* v. *Guedalla* (1), where under an express power to appoint "a new trustee or new trustees" Buckley J. held that there was no rule

(1) [1903] 2 Ch. 723.

of law prohibiting a man from appointing himself, but he left open the question whether it could be done when the words of the power were to appoint some "other" person.

In *In re Skeats' Settlement* (1) the words were "any other person or persons," and Kay J. held that the terms of the power required that the trustee to be appointed should be some person "other" than the donee of the power. In *In re Newen* (2) the words of the power were "any other proper person or persons." No decision upon this particular question was necessary because the point was given up during argument, but your Lordship expressed an opinion that, without any such words, no trustee having a fiduciary power of appointing trustees could appoint himself trustee either alone or together with any other person. Those cases are distinguishable, perhaps, on the ground that "any other" differs from "another" or "other," the words of the Act, inasmuch as "any" other could not be used in correlation to any person other than the person exercising the power. I submit that in s. 10, sub-s. 1, of the Trustee Act, 1893, the words "another person or other persons" are used in correlation, not to the person exercising the power, but to the person in place of whom the new trustee is to be appointed, and that would seem to be the grammatical construction as well. The object of the section was to facilitate the appointment of new trustees. It was not intended that the section should have the effect of narrowing the scope and power of appointment.

If this appointment is not good, I ask that the plaintiffs may be appointed trustees by the Court.

Waddilove and *W. J. Whittaker*, for defendant beneficiaries.

KEKEWICH J. The question in this case is whether the legal personal representative of the last survivor of two trustees can validly appoint himself and another to be new trustees of the original testator's will under the statutory power conferred by the Trustee Act, 1893, there being no express power in that behalf contained in the will itself.

Now, certainly, in *In re Newen* (2) I expressed a decided opinion that the law was that no trustee having a fiduciary power of

(1) (1889) 42 Ch. D. 522. (2) [1894] 2 Ch. 297.

KEKEWICH J.
1906
SAMPSON, *In re.* SAMPSON *v.* SAMPSON.

appointing a trustee could exercise that power by appointing himself, either alone or together with any other person, but, as appears from the report, the point was really given up by Mr. Warmington, who was not likely to have given it up if he could have successfully maintained it. I expressed an opinion, however, in the course of my judgment, that the power was to appoint "any other proper person or persons" and that "you cannot yourself be another person than yourself."

The point came before Buckley J. in *Montefiore* v. *Guedalla* (1) in another form. In that case the particular power conferred by the will was as follows:—"It shall be lawful for the acting trustee or trustees for the time being of this my will, or the executors or administrators of the last acting trustee, to appoint a new trustee or trustees in the place or stead of such trustee so dying, refusing or becoming incapable to act or wishing to retire as aforesaid." Buckley J. held that the executors of the last survivor could appoint one of themselves with another person to be new trustees, and he distinguished the cases where the power was to appoint "other" persons as was the case in *In re Newen* (2) and *In re Skeats' Settlement.* (3) He says (4): "The first step is to look at the language of the power. Where you find that the power is to appoint some 'other' person, the question may arise whether that means some person other than the appointor. In such a case the donee of the power may not be amongst the persons capable of being appointed. But in the present case the word 'other' does not appear."

Now I will take what Buckley J. calls the first step, and look at the language of the power. In the present case it is contained in s. 10, sub-s. 1, of the Trustee Act, 1893. The power is for "the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee" to appoint "another person or other persons." What does "another person or other persons" mean?

(1) [1903] 2 Ch. 723.
(2) [1894] 2 Ch. 297.
(3) 42 Ch. D. 522.
(4) [1903] 2 Ch. 725.

Does it only mean some person or persons other than the trustees who are dead or are remaining out of the United Kingdom, or who desire to be discharged, or refuse, or are unfit or incapable? or does it also mean some person or persons other than the person exercising the power of appointment? Now let us go back. The power is given to the person nominated by the instrument, if any, creating the trust to make the new appointment, and he is to appoint "another person or other persons" to be trustees. Surely that must mean that the person appointed trustee is to be another person different from the person or persons nominated for the purpose of appointing new trustees. If there is no such donee expressly nominated, then the surviving or continuing trustee—which latter includes a retiring or refusing trustee—is to appoint "another person or other persons" to be trustees. It would be reducing it to an absurdity to say that they might appoint themselves, for in neither case could the person making the appointment possibly appoint himself, because in the one case he is already a trustee and in the other case he is a retiring or refusing trustee. So that it is clear that where the appointment is made by a continuing or surviving trustee or by a retiring or refusing trustee the words "another person or other persons" must mean some person or persons other than the person exercising the power of appointment, and it follows that these words must bear the same meaning when the persons exercising the power are the personal representatives of the last surviving or continuing trustee, for, whatever the words mean, they must bear the same meaning throughout, whether the power is being exercised by the surviving or continuing trustee or by the personal representatives of the last surviving or continuing trustee.

Therefore, without expressing any difference of opinion from that given in *Montefiore* v. *Guedalla* (1) by Buckley J., about whose decision I will only say that it may require reconsideration at some future time, I am of opinion that the present case falls within the exception which he mentions, and I declare the appointment bad.

The summons asks that, if necessary, the appointment of the

(1) [1903] 2 Ch. 723.

KEKEWICH J. 1906 SAMPSON, *In re.* SAMPSON *v.* SAMPSON.

plaintiffs as trustees may be confirmed by the Court. I cannot confirm an appointment which I have already held to be bad, but under the general powers conferred upon the Court by the Trustee Act, 1893, I will appoint the plaintiffs trustees of Joseph Sampson's will.

Solicitors: *Barlow, Barlow & Lyde.*

R. M.

KEKEWICH J. 1906 *Jan.* 25; *Feb.* 1.

In re GASKELL AND WALTERS' CONTRACT.

[1905 G. 2288.]

Felony—Convict—Administrator—Power to Disentail Convict's Estates Tail—Forfeiture Act, 1870 (33 & 34 *Vict. c.* 23), *ss.* 10, 12.

The Forfeiture Act, 1870, provides that all the real and personal property of a convict shall vest in the administrator appointed under the Act for all the estate and interest of such convict therein, and that the administrator shall have absolute power to sell, convey and transfer any part of such property:—

Held, that this power did not authorize the administrator to convey in fee simple property of which the convict was seised for an estate tail.

Purchaser's summons under the Vendor and Purchaser Act, 1874.

On June 1, 1905, F. H. Gaskell was appointed under the Forfeiture Act, 1870, administrator of the estate of a convict who was undergoing a sentence of penal servitude for felony. The property of the convict included a rent-charge of 300*l.* a year issuing out of real estate in Swansea, to which rent-charge he was entitled for an estate tail. By a disentailing deed dated July 5, 1905, Gaskell purported to bar his (Gaskell's) estate tail in the rent-charge, and this deed was duly enrolled. By an agreement for sale dated November 3, 1905, Gaskell, as administrator of the convict's estate, agreed to sell to William Walters for 1200*l.* this rent-charge of 300*l.* in fee simple in possession, subject only to the life estate of the convict therein, which was already vested in the purchaser.

The purchaser objected to the title, on the ground that the

Forfeiture Act, 1870, did not empower the administrator of a convict's estate to bar the estates tail of the convict, and further, that the disentailing deed was wrong in form, since the estate tail to be barred was the estate tail of the convict, and not of the administrator; and he took out this summons for a declaration that a good title had not been shewn according to the contract. This question turned upon the construction of ss. 10 and 12 of the Forfeiture Act, 1870. (1)

Tyldesley Jones, for the purchaser. Sect. 10 of the Forfeiture Act, 1870, vests the property of the convict in the administrator for all his estate and interest, and s. 12 enables him to sell such property. A tenant in tail has a beneficial interest which endures for his life only (Co. Litt. 326 b, note 4), and he has also a statutory power of disposition. Under the Act of 1870 the estate and interest of the convict are vested in the administrator, but the statutory power of disposition is not vested in him. The result is that the Act does not authorize the administrator to disentail property of which the convict was seised for an estate tail. If the Act had intended that the administrator should have that power it would have contained an express provision to that effect. This is illustrated by the Bankruptcy Act, 1883. Sect. 20 of that Act provides that the property of the bankrupt shall vest in the trustee. Sect. 44 provides that the property of the bankrupt shall (subject to certain exceptions) include all property belonging to the bankrupt at the commencement of his bankruptcy, or acquired by him before his discharge, and s. 168 defines "property" in the widest possible terms. Sect. 56 empowers the trustee, by sub-s. 1, to sell all or any of the property of the bankrupt, and,

(1) The Forfeiture Act, 1870, provides as follows:—

Sect. 10: "Upon the appointment of any such administrator in manner aforesaid all the real and personal property, including choses in actions [*sic*], to which the convict named in such appointment was at the time of his conviction, or shall afterwards while he shall continue subject to the operations of this Act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein."

Sect. 12: "The administrator shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit."

KEKEWICH J. 1906 GASKELL AND WALTERS' CONTRACT, *In re.*

by sub-s. 5, to deal with estates tail in the same manner as the bankrupt might have done. If the power of disentailing had been included in the power to sell sub-s. 5 would not have been necessary, and the inference is that without that express provision the power to disentail would not have passed to the trustee. The earlier Bankruptcy Acts also contained an express power of disentailing. Thus, 21 Jac. 1, c. 19, s. 12, enabled the Commissioners to bar the estates tail of a bankrupt, and 6 Geo. 4, c. 16, s. 65, contained a similar power: 1 & 2 Will. 4, c. 56, s. 26, vested the real estate of the bankrupt in the assignees of the bankrupt without any conveyance by the Commissioners; but the power to bar the entail remained in the Commissioners under s. 65 of the Act of George IV., until it was repealed by s. 55 of the Fines and Recoveries Act, and by s. 56 of that Act, this power was again vested in the Commissioners. There being no words in the Forfeiture Act transferring to the administrator the powers exercisable by the convict, or enabling the administrator to bar the entail, he has no such power: *In re Starkie* (1); *Davis* v. *Tollemache* (2); *Sturgis* v. *Morse*. (3) The power of disentailing conferred by the Fines and Recoveries Act is contained in s. 15, and that power is given to the actual tenant in tail, and it is not applicable to this case. That this power is not incidental to the beneficial interest of the tenant in tail is shewn by *Bankes* v. *Small* (4), where it was held applicable to a tenant in tail who had created a base fee and parted with it.

Before the passing of the Forfeiture Act, where the felon was entitled in fee simple the Crown took the whole estate, but where he was entitled for an estate tail the Crown took for the life of the tenant in tail only, because the corruption of blood did not extend to the issue, inasmuch as they took, not as heirs of the donee, but per formam doni. The object of the Forfeiture Act, 1870, was two-fold. It was intended, first, to mitigate the consequences of a conviction for felony to the convict; and, secondly, to provide for the administration of the convict's property. It was not intended to enlarge the area of the property to be dealt with or to disinherit the issue in tail. The only decision upon

(1) (1834) 3 My. & K. 247.
(2) (1856) 2 Jur. (N.S.) 1181.
(3) (1860) 2 D. F. & J. 223, 233.
(4) (1887) 36 Ch. D. 716.

ss. 10 and 12 of the Forfeiture Act is *Carr* v. *Anderson* (1), but that decision relates to personal estate.

S. R. Earle, for the vendor. The terms of the Forfeiture Act are wide enough to include this power of barring the entail. As Buckley J. said in *Carr* v. *Anderson* (1), "wider language it is difficult to conceive." The administrator takes over all the property of the convict, and he has an absolute power to dispose of it. The estate and interest of a tenant in tail include not only the beneficial life estate, but also the power of enlarging that life estate into an estate in fee simple by executing a disentailing assurance. The intention of the Legislature was to enable the administrator to deal with the property of the convict in the same way as the convict might have done himself prior to his conviction. If the administrator has no power to bar the entail the power is suspended during the sentence, since by s. 8 of the Forfeiture Act the convict is expressly disabled from alienating his property. That is a very curious result of an enactment which by the width of its language appears to be intended to sweep in everything. Sect. 15 of the Fines and Recoveries Act does not affect the construction of this Act, and the definitions of "estate tail" and "tenant in tail" in that Act are so framed as to meet the case of a trustee disentailing the estate of a bankrupt under the powers of the Bankruptcy Act, 1883; and they would equally meet this case. As to the argument founded on the provisions of the Bankruptcy Act, 1883, the special power to bar the entail was no doubt inserted because it had existed in the earlier Bankruptcy Acts from the time of James I., but it must not be assumed that there is no such power wherever that power is not expressly conferred. As to the object of the Forfeiture Act, the Act is intituled "An Act to abolish Forfeitures for Treason and Felony," and for this purpose any difference between the consequences of treason and felony ought not to be regarded. But by 26 Hen. 8, c. 13, estates tail were liable to forfeiture for treason, and although there were many cases under that Act, it was never objected that the King took only a life estate. On the contrary, he entered to the exclusion of the issue: Viner's Abridgment, 2nd ed. vol. 13, "Forfeiture (C)," pp. 438,

(1) [1903] 1 Ch. 90, 94.

KEKEWICH J. 1906 GASKELL AND WALTERS' CONTRACT, *In re*.

439. As to the cases, in *Davis* v. *Tollemache* (1) and *Sturgis* v. *Morse* (2) the question was as to the construction of a conveyance, and *In re Starkie* (3) was a decision under a different Act.

KEKEWICH J. intimated that he would give notice to the purchaser's counsel if he required to hear a reply.

Feb. 1. KEKEWICH J. Judgment was reserved in this case less in order to arrive at a correct conclusion than because in a case of such novelty and importance I thought it right to refer more carefully than could be done in Court to the authorities cited by Mr. Tyldesley Jones, whose argument deserves commendation alike for industry and skill.

The question is simply this. A man convicted of felony was seised of land for an estate tail. An administrator appointed under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), purported to sell that land in fee simple, and the purchaser took the objection that he had no title to convey such estate. The proper answer to the objection depends on the construction of the statute. It was competent for Parliament to provide that the administrator should have the right claimed by him, but undoubtedly express words were required for the purpose. What was vested in the administrator was an estate in fee determinable by the entry of issue (4), and according to all canons of construction no general words would suffice to vest in the administrator a fee simple absolute.

It occurred to me to consider the law in force prior to the Act of 1870 as a factor in the construction of it. As a general rule, in construing an Act of Parliament purporting to amend the law, it is right to ascertain and bear in mind what the law was prior to the amendment, and the rule could not safely be neglected here; but on reflection I think that the old law does not render much, though I do not say it does not render any, assistance in determining the intention of the Legislature.

(1) 2 Jur. (N.S.) 1181.
(2) 2 D. F. & J. 223, 233.
(3) 3 My. & K. 247.
(4) [Being the estate which passes at common law by an innocent conveyance of tenant in tail purporting to grant his whole estate or the fee simple: 1 Wms Saund. 346, ed. 1871; Challis, R. P. 2nd ed. 293, 302.—F. P.]

I will therefore content myself with saying that the old law, which will be found stated in Viner's Abridgment under the head "Forfeiture (K)," does not lend any countenance to the view that the Legislature contemplated the vesting in the administrator the extensive power which is contended for on his behalf.

The 10th section of the Act provides that all the real and personal property of the convict shall vest in the administrator for all the estate and interest of such convict therein, and the 12th section gives him absolute power to sell, convey, and transfer any part of such property. I do not find it necessary to refer expressly to any other section of the Act. It is clear on the construction of the 12th section that the administrator can sell, convey, and transfer only that which is vested in him, and that, according to the equally clear construction of s. 10, is only the real and personal property of the convict, which is vested in the administrator for all the estate and interest of such convict therein, and not for any other estate or interest. The legal consequence of this is that the administrator has vested in him and can sell a fee simple determinable, and not a fee simple absolute.

I might stop there, but reference was made to the Bankruptcy Acts, and it is worth while to say a word upon them. There is no occasion to trace the history of bankruptcy legislation on this subject. It is enough to say that the Bankruptcy Act, 1883, following the lines of such preceding statutes as contain similar provisions, expressly enables—s. 56, sub-s. 5—the trustee to deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it, and it is a sound argument that this would not have been done if the provision for vesting the property of the bankrupt in the trustee, which is couched in as wide language as that employed in the Act of 1870, had already given the trustee the power thus conferred. This view is strongly confirmed by the authorities: see *In re Starkie* (1) and *Sturgis* v. *Morse* (2), and especially the concluding remarks in the judgment of Turner L.J.

Before parting with the case I must briefly notice the 15th section of the Fines and Recoveries Act, which was much pressed

(1) 3 My. & K. 247. (2) 2 D. F. & J. 223, 233.

KEKEWICH J. 1906 GASKELL AND WALTERS' CONTRACT, *In re.*

in argument, but really is of less importance than at first sight appears. True it is that this enactment prescribes the only circumstances and the only method under and by which according to general law an estate tail may be converted into an estate in fee simple, and in the absence of special legislation such as is found in the Bankruptcy Act it would be a fatal objection to the administrator's title; but on the other hand, if one could spell such special legislation out of the Act of 1870, that would operate sufficiently and the objection would fall to the ground, because the exceptional enactment would take the case outside the 15th section or be treated as a proviso extending it.

The objection of the purchaser must be upheld with costs. (1)

Solicitors: *Field, Roscoe & Co., for Collins & Woods, Swansea; Gibson & Weldon, for F. H. Gaskell, Cardiff.*

H. B. H.

KEKEWICH J. 1906 *Feb.* 14.

In re KEMPSTER. KEMPSTER *v.* KEMPSTER.

[1905 K. 391.]

Administration—Marshalling Assets—Direction for Payment of Debts—Insufficiency of Personal Estate—Pecuniary Legatees and Specific Devisees—Effect of Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-s.* 1, *and s.* 2, *sub-s.* 3—*Intention of Testator—Preservation of order in which Assets are Applicable.*

Although Part I. of the Land Transfer Act, 1897, has rendered unnecessary an express charge of debts on real estate, it has not affected the application of the doctrine of marshalling in favour of pecuniary legatees where land is devised subject to an express charge of debts, and the personalty is exhausted in paying debts.

Adjourned Summons.

By his will dated October 9, 1903, the testator, Thomas Kempster, appointed his wife, Deborah Kempster, the plaintiff, and the defendant, E. S. Kempster, his daughter, his executrices, and bequeathed to each of them a legacy of 50*l.* free of duty. He then directed that all his just debts and funeral

(1) Compare *Hilbers* v. *Parkinson* (1883) 25 Ch. D. 200, approved by C. A. *In re Dunsany's Settlement* [1906] W. N. 51.

and testamentary expenses should be paid as soon as possible after his decease, and after bequeathing various specific legacies, he gave his real estate and the residue of his personal estate to the plaintiff for her life and after her death to be equally divided between his four children, of whom the defendant Deborah Sheppard was one.

The testator died on January 20, 1905, and his will was proved by the plaintiff and the defendant E. S. Kempster.

The value of the real estate was 750*l.*, and of the free personal estate 156*l.* The debts and funeral expenses alone amounted to 187*l.*

The plaintiff took out this summons for the determination (inter alia) of the question whether the debts and funeral and testamentary expenses of the testator ought to be raised and paid (so far as might be necessary) out of the real estate devised by the will in exoneration of the personalty so as to leave the personalty not specifically bequeathed available for payment of the pecuniary legacies given by the said will.

Maugham, for the plaintiff. The general direction to pay debts contained in the will charges by inference the real estate with the payment of debts, and as the personal estate is insufficient, the pecuniary legatees are entitled to have the assets marshalled as against the specific devisees of the realty: *In re Roberts*. (1) That decision is applicable to the present case notwithstanding the provisions of the Land Transfer Act, 1897, making real estate liable for debts. Sub-s. 3 of s. 2 expressly provides that the Act shall not alter or affect the order in which real and personal assets are applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, and consequently the doctrine of marshalling has been preserved.

P. T. Blackwell, for the defendant E. S. Kempster, took up the same position.

Greenland, for the defendant Deborah Sheppard. The doctrine exemplified by *In re Roberts* (1) is not applicable, because under the Land Transfer Act, 1897, real estate now vests in the personal representatives and is made assets for payment of debts as if it

(1) [1902] 2 Ch. 834.

KEKEWICH J.
1906
KEMPSTER, *In re.*
KEMPSTER v. KEMPSTER.

were personal estate, but without affecting priorities or the liability of real estate to be charged with the payment of legacies. Consequently, the charge of debts is now meaningless, and ought not to throw legacies on the real estate if the personalty is exhausted in paying debts. That contention is suggested by Mr. Theobald in his book on the Law of Wills, 6th ed. p. 819, but he refers to the case of *Rickard* v. *Barrett* (1) as shewing that a similar argument used after the passing of the Administration of Estates Act, 1833, did not prevail. In that case, however, the testator had expressly charged his real estate with the payment of his debts, and as the statute in question, unlike the Land Transfer Act, 1897, excepted from its operation the case of real estate charged by the will with debts, the Vice-Chancellor was not influenced by the argument and held that it was a case for marshalling. The present case, however, is distinguishable in that respect, and I submit that the contention advanced is in no way damaged by the decision in *Rickard* v. *Barrett*. (1)

The proviso in the later part of sub-s. 3 of s. 2 of the Land Transfer Act, 1897, preserves the liability of real estate to be charged with the payment of legacies, but does not similarly preserve it with regard to debts. The Act, therefore, has taken away the effect of an express charge, and, that being so, the decision in *In re Roberts* (2) is not applicable, and the pecuniary legatees are not entitled to marshal.

Maugham, in reply.

KEKEWICH J. This is a case involving a question which arises out of the changes in the law introduced by Part I. of the Land Transfer Act, 1897, and which has been suggested by Mr. Theobald in his book on the Law of Wills, 6th ed. p. 819. The question is this: Before the Act a direction by a testator, similar to that in the present case, that all his just debts and funeral and testamentary expenses should be paid, was treated as a charge of the debts upon the real estate, and from that it was concluded that if resort was had to the personal estate, as often was necessary, in order to pay the debts, then the persons

(1) (1857) 3 K. & J. 289. (2) [1902] 2 Ch. 834.

entitled to the personal estate might come against the specific devisees of the real estate, and say: "We have paid what the testator did not intend us to pay, because, according to the construction put upon the will by the Court, he has expressed an intention that the debts shall be paid out of the real estate." That I must take to be settled by *In re Roberts* (1) and the authorities therein referred to.

Since the commencement of the Land Transfer Act, 1897, there has been no occasion to insert in a will any express charge of this kind, for Part I. of the Act has put real estate on an equality with personal estate as regards vesting in the personal representatives of the deceased, and has treated the real estate as equivalent to personal estate and as standing on the same footing as regards administration. Sub-s. 3 of s. 2 provides that "in the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate"; so that the necessity for an express charge of the debts upon the real estate no longer exists. There is now no occasion to look into the will to see if the testator has charged his real estate with payment of debts, because the law has done it for him, and really the charge, if it is to be found in the will, is now in that respect useless. So far, the contention which counsel for the devisee has sought to establish appears to me to be perfectly sound; but then it is desired to go a step further and say that the express charge contained in the will is not only useless, as not being necessary, but is also futile, and that no effect is to be given to it at all. But to that there are two answers. In the first place, why are the debts to be charged on the real estate, the personal estate having already paid them? And why are the persons entitled to the personal estate to be at liberty to come and say that the debts are to be paid out of the real estate? Because, according to the construction put upon the will by the Court, the testator has expressed his intention that the debts shall be paid out of the real estate. It may be that he has expressed his intention uselessly in one respect,

(1) [1902] 2 Ch. 834.

KEKEWICH J. 1906 KEMPSTER, *In re.* KEMPSTER *v.* KEMPSTER.

but that is no reason for not giving effect in other respects to his intention if expressed. The Act has not altered the construction. It says that such a charge is unnecessary, but it does not say that the charge is not there. I cannot hold, therefore, that, in the absence of express words, the intention of the testator as construed by the Court shall not prevail because the expression of that intention has become unnecessary.

Further, sub-s. 3 of s. 2 contains a proviso to the following effect:—"Provided that nothing herein contained shall alter or affect the order on which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies." The question which I am now considering is this: Are these debts, in the first place, to be paid out of the specifically devised real estate, or out of the personal estate, the ultimate deficiency in the latter event being made good out of the realty? They have, in fact, been paid out of the personal estate, but I have to determine the order in which the assets are to be respectively applied for the payment of the debts. The order in which assets are so applicable has been settled long ago by authority, and, in my opinion, that order has been preserved by the proviso I have just read. It seems to me, therefore, that this case falls within the decision in *In re Roberts* (1), and that the doctrine of marshalling is applicable.

Solicitors: *Foulger, Robinson & Miller, for E. J. Vine, Exmouth; S. Myers.*

(1) [1902] 2 Ch. 834.

R. M.

YOUNG *v.* CUTHBERT.

BUCKLEY J.

1906

[1905 Y. 985.]

Jan. 19, 24, 31.

Education — Public Elementary School—Non-provided School—Dismissal of Schoolmistress—Powers of Manager—Consent of Education Committee—Power of Committee to act by a Sub-committee—Powers of Section of Sub-committee — Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7, 17; *Sched. I., A* (6.).

Plaintiff was engaged as mistress of a non-provided school (a school maintained but not provided by the local education authority under the Education Act, 1902), under an agreement with the managers of the school, one of the terms of which was that either party might terminate the agreement on giving the other party three calendar months' notice in writing.

The Act of 1902 came into operation in the district in August, 1903, and the Berkshire County Council was "the local education authority."

The county council, acting under s. 17 of the Act, delegated all its powers under the Act (except the power of raising a rate or borrowing money) to an education committee; the committee, under Sched. I., A (6.), appointed a sub-committee to deal with the appointment and dismissal of teachers; and the sub-committee appointed a section to deal with the details "surrounding" the dismissal of teachers, and to make recommendations to the sub-committee.

In these circumstances the managers came to the conclusion that plaintiff was out of harmony with them and that this was detrimental to the best interests of the school, and on October 17, 1905, at a meeting at which plaintiff attended, the managers passed a resolution that plaintiff should be asked to resign, and that if she refused notice should be sent to the education committee that the managers desired to terminate their engagement with her. As plaintiff did not resign the managers on November 23 wrote to the education committee asking for its consent to the dismissal of the plaintiff forthwith on payment of three months' salary. On November 25 the section gave its consent, and on November 28 the education secretary wrote: "The committee will approve the notice given by your managers to Miss Y.,"—the plaintiff—"to terminate her engagement." On November 30 the managers gave plaintiff notice in writing of dismissal, stating that the notice had the approval of the education committee, and enclosing a cheque for three months' salary in lieu of notice. On December 9 the sub-committee approved and adopted the action of the section.

On December 18 plaintiff commenced an action to restrain the defendants from acting on the notice to her, and on January 19 applied for

BUCKLEY J.

1906

YOUNG v. CUTHBERT.

an injunction. On January 20, before the argument was concluded, the education committee passed a resolution consenting to the dismissal:—

Held, as follows: (1.) That the effect of the delegation under s. 17 was that the education committee was, in respect of any powers as to the dismissal of teachers, the educational authority.

(2.) That to the sub-committee there was delegated power to determine, and not merely to report to the committee upon, the question whether consent to dismissal should be given.

(3.) That the section was only a subordinate body, the duty of which was to consider and report to the sub-committee, and the action of which required the sub-committee's approval, and therefore that the consent of the education authority had not been obtained at the time of the dismissal.

But *held*, further: (4.) That, if consent to dismissal was required, it was not a condition precedent to dismissal, but if given subsequently operated as a ratification of dismissal with the provisional consent of the section.

(5.) That the effect of s. 7 was that unless the education authority intervened, the power to appoint and dismiss teachers rested with the managers.

(6.) That if the education authority intervened, the managers must either yield to that authority's wishes, or disqualify the school for maintenance from public funds; and

(7.) That the requirements of the Act as to consent were operative only as between the managers and the education authority, and gave no right to the teacher.

Semble, that when the managers of a non-provided school fail to comply with the requirements of any of the conditions and provisions contained in clauses (*a*) to (*e*) of sub-s. 1 of s. 7 of the Act of 1902, compliance with any requirement cannot be enforced by mandamus or otherwise—the only consequence of the failure being that the local education authority is released from its obligation to maintain the school out of public funds.

On July 5, 1900, the plaintiff, Miss Isabel Pearce Young, was appointed head-mistress of the St. John's Home School, Clewer, in the county of Berks, under an agreement of that date, made between the Rev. T. T. Carter and others, therein described as managers of the school, of the one part, and the plaintiff, therein called the teacher, of the other part. Clause 5 of this agreement was as follows: "This agreement may be terminated at any time by either of the parties hereto on giving to the other of them three calendar months' previous notice in writing to that effect, and if such notice be given by the managers, it shall be given in accordance with the decision of a meeting called for the special purpose, and of which every manager shall have had due notice."

The Education Act, 1902 (2 Edw. 7, c. 42), received the Royal assent on December 18, 1902, and came into force in the district in which the school was on August 30, 1903.

The school was a "non-provided school" under the Act, being maintained but not provided by the local education authority.

The local education authority under the Act was in this case the Berkshire County Council, which, under s. 17 of the Act, delegated all its powers except those of raising a rate and borrowing money to an education committee; and the education committee, in pursuance of clause A (6.) of the first schedule to the Act, appointed several sub-committees, including a school management committee, to which were committed all questions relating to the appointment and dismissal of teachers.

The sub-committee appointed a section to deal with the details surrounding the dismissal of teachers and to make recommendations to the sub-committee.

Under s. 6, sub-s. 2, of the Act, there was appointed, in place of the former managers, a body of managers consisting of four foundation managers, and of two other managers.

The six managers of the school in 1905 were the Rev. G. S. Cuthbert, the Rev. G. J. Foster, Miss C. B. Ramsay, Miss Beatrice Napier, Colonel the Hon. C. R. Hay-Drummond, and Mr. W. Green, senior, the defendants in the present action.

Early in 1905 it was considered that the efficient working of the school under the plaintiff was difficult, and on August 12 and October 17, meetings of the managers were held with reference to the matter, at the latter of which the plaintiff attended at the request of the managers.

On November 23, 1905, Miss Ramsay, one of the managers, at their request, wrote to the education secretary of the education committee asking for its consent to the dismissal of the plaintiff forthwith on payment of three months' salary.

On November 25, the section of the sub-committee decided to recommend that the consent should be given.

On November 28, the secretary wrote: "The committee will approve the notice given by your managers to Miss Young to terminate her engagement."

On November 30, Miss C. B. Ramsay wrote to the plaintiff as

BUCKLEY J. 1906 YOUNG v. CUTHBERT.

follows: "The managers desire me to give you notice of the termination of your engagement as head teacher from November 30, and that this notice has the approval of the Berkshire Education Committee. They desire that you should withdraw from the school on Friday, December 1, and instruct me to enclose a cheque for three months' salary at 90*l.* a year."

On December 2, the plaintiff replied acknowledging the receipt of Miss Ramsay's letter and saying: "I have now obtained advice thereon, and am advised that the notice is invalid and inoperative, and I shall therefore hold myself to be in the service of the managers without notice as heretofore and shall be at all times willing to continue my duties as head-mistress of the school."

The plaintiff accordingly continued her duties until December 4, when on going to the school she was told that the children had been given a holiday. The next day she found the school locked up and received a letter from Miss Ramsay as follows: "If your services are as you say, at the disposal of the managers, which they do not admit to be the case, they dispense with your attendance at the school."

On December 18, the plaintiff commenced an action, claiming an injunction to restrain the defendants from dismissing her, or purporting to dismiss her from her office of head-mistress of the school "until the consent of the education authority for the county of Berks has been obtained, and until an opportunity has been given her to defend herself before the properly constituted authorities."

On the same day, the plaintiff served a notice of motion for an injunction in the same terms. The motion came on for hearing on January 19, 1906.

Buckmaster, *K.C.*, and *Arthur R. Thomas*, for the plaintiff. Having regard to the provisions of the Education Act, 1902, the defendants could not dismiss the plaintiff without the consent of the local education authority, and that consent has not been obtained.

By s. 1, for the purposes of the Act, the council of every county is to be the local education authority, and by s. 6, sub-s. 2, "all public elementary schools not provided by the local education

authority"—and this is a non-provided school—"shall, in place of the existing managers, have a body of managers" appointed in the manner provided by the Act. Then by s. 7, sub-s. 1, the local education authority is to maintain and keep efficient all the necessary public elementary schools within their area, and to have control of all expenditure, except that for which the managers are to provide, "but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with." Then before sub-s. 2 come certain provisions, lettered (*a*) to (*e*). Provision (*a*) is that the managers shall carry out any directions of the local education authority as to secular instruction, including directions "for the dismissal of any teacher on educational grounds," and that if the managers fail to carry out any such direction the local education authority shall, in addition to their other powers, have power to carry out the direction as if they were the managers; and by provision (*c*), "the consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld, except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds"—which do not here exist—"connected with the giving of religious instruction in the school." Then provision (*d*) is that the managers are to provide the school-house and out of funds provided by them keep it in good repair, except that damage due to fair wear and tear is to be made good by the authority.

The conditions and provisions lettered (*a*) to (*e*) are separate affirmative enactments binding on the persons affected, and s. 7 is to be construed as if the lettered provisions were independent enactments, followed by a separately enacting clause that the local education authority is to maintain and keep efficient the school only so long as the lettered provisions are complied with. Sub-s. 7 of s. 7, on which the defendants will rely, is that "the managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section)"—words of great importance—"have the exclusive

BUCKLEY J. 1906 YOUNG v. CUTHBERT.

power of appointing and dismissing teachers." The Act was framed for the protection of the teachers, and not merely to impose conditions on the performance of which the school was to be maintained by the local education authority, but the plaintiff has never been heard in her own defence by the authority which ought to protect her. Under s. 5 that authority has the control of all secular instruction in non-provided schools, the scheme being that only the religious instruction shall be under the control of the managers.

Sect. 17 provides that any council having powers under the Act shall establish an education committee and that all matters relating to the exercise by the council of their powers under the Act, except the power of raising a rate or borrowing money, are to stand referred to the education committee, and the council, before exercising any such powers, are, unless the matter is urgent, to receive and consider the report of the education committee with respect to the matter in question ; and the council may also delegate to the education committee, with or without restrictions or conditions, any of their powers except the power of raising a rate or borrowing money. But assuming the education committee is the body whose consent is necessary to the dismissal of a teacher, that body is a judicial one and cannot delegate its jurisdiction to a sub-committee. The consent of the education committee itself has never been obtained, and if the sub-committee gave a consent, that was not sufficient.

Sect. 25 says that the provisions of the first and second schedules to the Act, relating, amongst other things, to education committees and managers, are to have effect for the purpose of carrying the Act into effect; but the only provision in the schedule as to sub-committees is clause A (6.) of Sched. I., which says that "an education committee may, subject to any directions of the council, appoint such and so many sub-committees, consisting either wholly or partly of members of the committee, as the committee thinks fit."

In the present case even the consent of the sub-committee was not obtained.

[They also referred to *Jones* v. *Hughes*. (1)]

(1) [1905] 1 Ch. 180.

At this stage of the argument it was stated that a meeting of the education committee was fixed for the following day, January 20, and his Lordship ordered the further hearing of the case to stand over for some days with a view to ascertaining what the committee would do with reference to the plaintiff's dismissal.

On January 20, 1906, the Berkshire Education Committee passed the following resolution: "That the Education Committee hereby consent, in accordance with s. 7, sub-s. 1 (*c*), of the Education Act, 1902, to the dismissal by the managers of Clewer St. John's School of Miss Isabel Pearce Young, the head-mistress, notice of such dismissal having been given on November 30 last by the managers to Miss Young."

The plaintiff had applied through her solicitors for a hearing before the committee, but this was refused.

January 24. The argument was continued.

Buckmaster, K.C. The consent now obtained comes too late; it ought to have been given before the dismissal.

W. F. Hamilton, K.C., and *Edward Ford*, for the defendants. The main objects of the Education Act, 1902, were to abolish school boards and to transfer their rights and duties to the education authorities provided by the Act, and to have voluntary schools maintained out of the rates on certain conditions. Sect. 7, sub-s. 1, says that the education authority is to maintain public elementary schools which are not provided only so long as certain specified conditions and provisions are complied with, and if the plaintiff's counsel are right, managers who neglected to keep the school-house in proper repair might be indicted for a misdemeanour: *Reg.* v. *Price*. (1) The plaintiff wants to take clauses (*a*) to (*e*) in sub-s. 1 of s. 7 out of the section altogether and turn them into separate sections. But sub-s. 2, the next provision, only applies to schools "maintained but not provided," and sub-s. 7 expressly gives the managers of a non-provided school all powers of management, and (subject to the "powers" of the local education authority under the section) "the exclusive power of appointing and dismissing teachers." By s. 24, sub-s. 3, of the Act of 1902 the expression "powers"

(1) (1840) 11 Ad. & E. 727.

BUCKLEY J. 1906 YOUNG v. CUTHBERT.

is, unless the context otherwise requires, to have the same meaning as in the Local Government Act, 1888, and by s. 100 of that Act "the expression 'powers' includes rights, jurisdiction, capacities, privileges, and immunities." The power to dismiss is only in the local education authority if the managers refuse to dismiss and the dismissal is on educational grounds. The consent of the local education authority has now been given, and, assuming it to be necessary, it is immaterial whether it is given before or after the dismissal. Sect. 7 was not inserted for the protection of the teachers, and the consent of the sub-committee, given before the dismissal, was sufficient.

Thomas, in reply. The consent of the education authority could not be given after the act complained of had been done. Sect. 17, sub-s. 2, only gives power to delegate to the education committee, and that committee could not delegate the power of consenting to a sub-committee.

Arthur Underhill, for the county council.

Cur. adv. vult.

Jan. 31. BUCKLEY J. On November 30, 1905, the plaintiff was in the employment of the defendants as mistress of the St. John's Home Day School at Clewer, in Berkshire, upon the terms of an agreement dated July 5, 1900, which contained a provision that the agreement might be terminated at any time by either party on giving the other three calendar months' notice in writing. The school is what is known as a "non-provided" school under the Education Act, 1902, that is to say, it is a school maintained, but not provided, by the local education authority. On November 30, 1905, the defendants, as managers of the school, gave the plaintiff notice of the termination of her agreement from December 1, and enclosed with their letter a cheque for three months' salary in lieu of notice. They stated that this notice had the approval of the Berkshire Education Committee. On December 2, 1905, the plaintiff wrote that she was advised that the notice was invalid and inoperative. The ground of her contention was that, having regard to the provisions of the Education Act, 1902, the managers could not dismiss her without the consent of the local education authority,

and that that consent had not been obtained. On December 18 she issued the writ in this action, asking for an injunction to restrain the defendants from dismissing her until the consent had been obtained, and until an opportunity had been given her to defend herself before the properly constituted authority; and on the same day she gave a notice of motion for an injunction in the same terms. That motion came on for hearing before me on Friday, January 19, 1906. It then appeared that one question in dispute was whether the education authority had given their consent, and that a meeting of the education committee of the district was to be held the next day, Saturday, January 20. I, therefore, directed the further hearing of the motion to stand over until Wednesday, January 24, so that I might know what the committee would do. On January 24 it appeared that on January 20 the education committee passed a resolution "that the education committee consent to the dismissal" in question, "notice of such dismissal having been given on November 30 last." Under these circumstances, I pointed out that an interlocutory injunction was impossible, and that the matter resolved itself into a question possibly of money and also of costs, which could only be determined at the trial. The parties, with great good sense, consented to treat the hearing of the motion as the trial of the action; and the plaintiff's counsel, upon my invitation, stated that the judgment for which under those circumstances he asked was a judgment for a declaration that the plaintiff had received no valid notice of dismissal and for the costs of the action. I have, therefore, now to give judgment at the trial of the action finally determining the plaintiff's rights in the matter.

The plaintiff contends that the consent of the local education committee is, under the Education Act, 1902, a condition precedent to dismissal by the managers, that such consent had not been given on November 30, 1905, and that consequently the notice of that date is invalid. I will assume, in the first instance, that on November 30, 1905, the consent of the authority had not been given, and upon that assumption will investigate what is the true construction of the section of the Act of Parliament bearing upon this matter. Sect. 7 of the Act of 1902 provides

BUCKLEY J. 1906 YOUNG v. CUTHBERT.

that the education authority shall maintain and keep efficient public elementary schools, but in the case of a school not provided by them, only so long as certain following conditions and provisions are complied with. One of these conditions is (clause (1.) (*c*)) that the consent of the authority shall be required to the dismissal of a teacher unless the dismissal be on certain grounds, being grounds not relevant to this case.

The plaintiff argues that the conditions and provisions which are found in clauses (*a*) to (*e*) of s. 7 are affirmative statutory provisions binding as such upon the parties affected—in other words, that s. 7 is to be read as if clauses (*a*) to (*e*) formed independent affirmative sections of the Act and were then followed by another clause providing that the authority shall maintain and keep efficient the school only so long as clauses (*a*) to (*e*) are complied with. In my judgment this is not the construction of the Act of Parliament. The contract between the managers and the teacher is a contract to which the education authority is not a party. The question is whether that contract between the managers and the teacher is to be read as if, by virtue of the statute, it contained a clause to the effect that the managers will not dismiss the teacher without the consent of the authority. Does the Act of Parliament introduce such a stipulation into the contract? The answer, I think, is in the negative. Sect. 7 contemplates that the conditions may or may not be complied with; it cannot be, then, that the statute is to be read as requiring that they shall be complied with. Reading the section quite shortly, and introducing only the relevant words, its frame is as follows: The local education authority shall maintain and keep efficient the school only so long as the consent of the authority shall be required to the dismissal of a teacher —meaning, I think, only so long as the managers, as between themselves and the authority, observe the condition that without the consent of the authority they will not dismiss. Let me take another of the conditions—say clause (*d*)—and see what is the true construction of the Act in that case. Suppose the managers do not keep the school-house in repair, what is the consequence? It will follow that the local authority will no longer be bound to maintain and keep efficient the school. But could proceedings

be instituted against the managers for breach of a statutory duty by way of mandamus to compel them to keep the schoolhouse in repair or by way of consequences for a misdemeanour? In my judgment, certainly not. Take again clause (*b*). Does that give the local authority statutory authority to inspect the school? I think not. The frame of the section is that the authority shall maintain the school so long as the authority shall have power to inspect the school. From this it results that if the managers refuse inspection the local authority ceases to be liable to maintain, but not that the school can be compelled to submit to inspection. There is another sub-section to be considered—viz., s. 7, sub-s. 7—which provides that, subject as there mentioned, the managers shall have the "exclusive power of appointing and dismissing teachers." Exclusive of whom? Exclusive, I conceive, of the education authority. This shews that the managers have the dominant power, and that that is controlled only by the powers which the local education authority have under the section. If the consent of the local authority is a condition precedent to appointment or dismissal, the words "exclusive power" seem strangely inappropriate. The true meaning, I think, is that, unless the education authority intervene, the power of appointment and dismissal rests with the managers, and that the consent of the authority is required in the sense that, if the education authority interpose, the managers must choose between two alternatives—viz., either to yield to the wishes of the authority or to cease to receive maintenance from public funds. The words as to consent, whatever be their effect, are, I think, operative only as between the authority and the managers and do not give any right to the teacher. There is nothing in the Act to affect the contract between the managers and the teacher. The effect of the provisions of the Act is only to produce certain consequences as between the managers and the local authority if the former act without the consent of the latter in any case in which such consent is required.

Thus far I have assumed that the consent of the local authority had not been given. The facts as to what had been done are as follows: The Education Act came into force in this district on August 30, 1903. In October, 1905, no charges or complaints

BUCKLEY J. 1906 YOUNG v. CUTHBERT.

had been brought against Miss Young by the managers, but they had come to the conclusion that the teacher was out of harmony with the managers and that this was detrimental to the best interests of the school. Under these circumstances, on October 17, 1905, there was a meeting of the managers, at which the plaintiff attended, and a resolution was passed that, "in view of the evident friction with which the school was being conducted," the lady should be asked to resign, and that, if she refused, notice should be sent to the Berkshire Education Committee that the managers desired to terminate their agreement with her. The lady did not resign, and accordingly a letter was written by the managers to the Berkshire Education Committee, which evoked a reply of November 28, 1905. That reply stated that "the committee will approve the notice given by your managers to Miss Young to terminate her engagement." Acting upon that letter, the notice of dismissal was given on November 30. The authority for the letter of November 30 was this: The Berkshire County Council had, pursuant to s. 17 of the Act of 1902, delegated their powers to an education committee, and that committee, in exercise of the power given by Sched. I., A (6.) of the Act, had appointed a sub-committee to deal with, amongst other things, the appointment and dismissal of teachers. The sub-committee appointed a section to deal with the details surrounding the dismissal of teachers and to make recommendations to the sub-committee. On November 25 the section gave its consent. This was the consent referred to in the letter of November 28. On December 9 the sub-committee approved and adopted the action of the section. The writ was issued, as I have stated, on December 18. Subsequently, on January 20, the consent of the education committee itself was given, as I have before stated.

In my judgment, the education committee, having regard to s. 17 of the Act, could exercise all the powers of the local education authority. The education committee was for this purpose the original authority. Further, having regard to Sched. I., A (6.), the sub-committee was, I think, a body which could determine, and not merely report to the committee upon, a question such as this consent. But I do not think that the "section" was other than a subordinate body. Its duty was to consider and

recommend to the sub-committee. Its action required, I think, approval by the sub-committee. Under these circumstances it seems to me that on November 30, 1905, the consent of the authority had not been obtained. But in my judgment this is not a matter upon which the plaintiff can rely as invalidating the notice which was given her. This matter of consent was, as I have said, a matter arising only as between the authority and the managers. It was not a condition precedent to a good notice of dismissal. A subsequent consent by the authority to that which the managers had done under a provisional consent given by their subordinate section refers back, I think, and ratifies the act which the managers did, if any such ratification was required. Moreover, on December 9, being before the issue of the writ, the sub-committee had approved the action of the section. Further, and as a separate point, absence of consent, if there was such absence at the relevant date, is not, I think, a matter which the plaintiff can set up. It gives her no right. It is a matter which would have no consequences except as between the school and the education authority. In my opinion the action fails and I dismiss it, and, if the defendants ask for costs, it must be dismissed with costs.

The defendants asked that the action might be dismissed with costs, and this was done.

Solicitors for plaintiff : *Baker & Nairne.*

Solicitors for defendants : *Freeman & Son.*

Solicitors for county council : *Dale, Newman & Hood, for J. T. Morland, Reading.*

F. E.

BUCKLEY J.

1906

Jan. 29, 30, 31; *Feb.* 7.

J. L. DENMAN & CO., LIMITED *v.* WESTMINSTER CORPORATION.

J. C. CORDING & CO., LIMITED *v.* WESTMINSTER CORPORATION.

[1905 J. 1134.]
[1905 J. 1158.]

Local Government—Streets—Widening—Compulsory Powers—Adjudication—Notice to Treat for entire House—Prior Agreement to Re-sell Part not wanted for Widening—Owner's Right to Retain—Michael Angelo Taylor's Act, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96.

A local authority entrusted by Michael Angelo Taylor's Act, 1817, with statutory powers to take land compulsorily for the purpose of widening streets must use them bona fide for the statutory purpose, and for none other. They have no right to seek to reduce the expense to the ratepayers by straining their powers in the interest of persons who desire to acquire the adjacent land from the owners of it. They are bound, under s. 80, to adjudicate whether any houses, and what part of any houses, are necessary to be taken for the improvement, and for this purpose they must form an honest judgment after consideration of all the facts of the case; otherwise their decision will not be binding.

Where a landowner desires to retain part of a house, the local authority cannot insist on taking the whole unless the remainder will be useless as a house. Whether that which is left will be a house or not is a question of fact to be determined in each case, and the circumstance that the part left will require some reconstruction is not conclusive evidence that it will not be a house.

Whether or not the power of a local authority to take the whole of a house ought to be measured by the wishes of the owner, the attitude which he takes up ought not to be disregarded; and if he desires to do upon his own land such work that that which is left will be a house regard ought to be had to that fact.

J. L. Denman & Co. were Crown lessees of Denman House, Nos. 19 and 20, Piccadilly, and J. C. Cording & Co. were sub-lessees of part of the house. At the back and at one side of the house was a large block of land, of which the freehold belonged to the Crown and the leasehold interest to a syndicate, which afterwards became a hotel company, formed with the object of erecting a hotel on this land. The London County Council proposed to widen

Piccadilly by throwing into the street a strip about twenty-six feet wide which formed part of the hotel company's land and of the site of Denman House. The Crown entered into an agreement with the London County Council that the latter should arrange with the City of Westminster for the exercise by them of the compulsory powers of Michael Angelo Taylor's Act for the acquisition of the strip; and that the Crown should grant to the London County Council an easement to enable them to widen the street. The Crown also entered into an agreement with the syndicate, under which the latter were to surrender the leases of their land and receive a lease of the whole block, except the strip, and of the remainder of Denman House, subject to J. L. Denman & Co.'s lease. By a third agreement, made between the syndicate and the London County Council, the syndicate were to acquire and surrender the other interests in the land to the Crown; the London County Council were, at the request of the syndicate, to induce the Westminster corporation to use their powers to enable the syndicate to acquire these interests. If the London County Council or the corporation thus acquired any land beyond the strip they were to assign it to the syndicate, subject to the owner's right of pre-emption; the syndicate were to demolish the buildings, including Denman House, build the hotel, and deposit with the London County Council 70,000*l.* to provide for payment of purchase-money and compensation. By a fourth agreement the corporation contracted with the London County Council to use their compulsory powers as desired. The London County Council, at the request of the syndicate, wrote to the corporation, asking them to exercise their powers, and enclosed a form of resolution for them to pass. By this form, which was passed without discussion, the corporation resolved to widen the street, and adjudged that (inter alia) Denman House obstructed the widening, and that the purchase of it would be necessary for that purpose. On June 10, 1905, the corporation served upon J. L. Denman & Co. and J. C. Cording & Co. notices to treat for the purchase of their several estates and interests in the whole of Denman House. The plaintiffs brought these actions for injunctions to restrain the defendants from proceeding on the notices, and, if necessary, a

BUCKLEY J.

1906

J. L. DENMAN & CO., LIMITED v. WESTMINSTER CORPORATION.

J. C. CORDING & CO., LIMITED v WESTMINSTER CORPORATION.

declaration that the adjudication was ultra vires on the ground that only part of the house was required for the widening,

The actions were heard consecutively, and one judgment was pronounced in both. The facts are fully stated and the agreements set out in the judgment.

Sir R. B. Finlay, K.C., and *R. J. Parker*, for J. L. Denman & Co. The defendants had no right to exercise their compulsory powers in order to take our land and hand it over to the syndicate. Michael Angelo. Taylor's Act gives them power to take this land only if it is required for widening the street. Their agreement to exercise their powers at the request of the syndicate and take land outside the strip was ultra vires. It would be most mischievous to allow a corporation entrusted with such powers to make agreements with persons not entrusted with them to use them in a particular way for private purposes. This is a device to benefit the syndicate at our expense. The defendants are indemnified by the London County Council, and the London County Council are indemnified by the syndicate. So the hotel company are really defending this action. Sect. 96, which provides that the corporation may sell any land which has been conveyed to them under the Act subject to the former owner's right of pre-emption, does not authorize them to enter into such an arrangement as this. These agreements have been before the Court, and are fully set out in *Pescod* v. *Westminster Corporation* (1), and the defendants were held to be justified in taking the whole of a house, but the facts in that case were very different from those in the present case, and this question on the agreements was not argued.

The corporation have exercised no discretion in the matter. By s. 80 they are bound to consider the circumstances and adjudge how much land is to be taken. But they only passed without discussing the form of resolution sent to them by the London County Council. Adjudication is the foundation of all the subsequent proceedings, and without it a notice to treat is bad. Sect. 80 provides that houses "or any part thereof" may be taken, and those words must be read into all the subsequent

(1) [1905] 2 Ch 475.

sections: *Thomas* v. *Daw*. (1) The corporation can be compelled to take part only of the house, unless they have formally adjudged that the possession of the whole is necessary for the purpose of widening the street: *Thomas* v. *Daw*. (1) If they have bona fide adjudged that the whole house is wanted for widening Piccadilly, their decision cannot be questioned; but they admit that part of the house is necessary to them for another purpose: *Gard* v. *London Commissioners of Sewers* (2), where the sections of the Act are set out. In fact, the plaintiffs are bound by the agreements not to use the whole house for widening the street. Whether the whole of a house is necessary is a question of fact in each case, but if any of the owners object to the whole house being taken, the Court will give effect to that wish: *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (3) (where the form of the resolution of adjudication was the same as in the present case); *Gordon* v. *Vestry of St. Mary Abbotts, Kensington*. (4) The corporation could not validly adjudicate that the whole of Denman House was wanted: *Lynch* v. *London Commissioners of Sewers*. (5) They cannot take the whole house against our wishes, unless they can prove that the remainder will be useless to us: *Aldis* v. *London Corporation* (6); *Thompson* v. *Hammersmith Corporation* (7); although the owner may be able to compel a local authority to take the whole of a house: *Gibbon* v. *Paddington Vestry* (8); *Parry* v. *Hammersmith Corporation*. (9)

Although there are cases in which a corporation may come to the conclusion that they want the whole of the site of a building, yet in this case it is not necessary to do so. No doubt the house will be curtailed by the removal of the strip, but the remaining part will still be a house and of use to us. The result of the authorities is that the corporation were not necessarily confined to the strip. But here the staircase and lift will be left, and a door into Air Street. Under the Act a house must be treated as a

(1) (1866) L. R. 2 Ch. 1.
(2) (1885) 28 Ch. D. 486.
(3) (1885) 30 Ch. D. 642.
(4) [1894] 2 Q. B. 742.
(5) (1886) 32 Ch. D. 72.
(6) [1899] 2 Ch. 169.
(7) Ante, p. 299.
(8) [1900] 2 Ch. 794.
(9) (1904) 21 Times L. R. 56.

BUCKLEY J. 1906 J. L. DENMAN & CO., LIMITED v. WEST-MINSTER CORPORATION. J. C. CORDING & CO., LIMITED v. WEST-MINSTER CORPORATION.

whole, and if there are various owners who take different views the local authority must take the whole; but that question does not arise.

Gore-Browne, K.C., and *Ashton Cross*, for J. C. Cording & Co., Limited. It is agreed that all the evidence in *J. L. Denman & Co., Ld.* v. *Westminster Corporation* shall be used in our action also. We therefore adopt the arguments which have been urged on behalf of J. L. Denman & Co., and we only desire to add one point on the facts. It appears that a member of the improvements committee of the defendants, who was also present at the general meetings which sanctioned the agreements and passed the resolution of adjudication, is, or was, the architect of the hotel company. His presence was sufficient to vitiate all the proceedings: *Reg.* v. *London County Council.* (1)

No difficulty need arise where a house belongs to several owners or occupiers and they take different views. Assuming that the local authority could under s. 80 deal separately with the various persons interested, they could take one part and leave another part. For instance, if the freeholder wanted them to take the whole and the leaseholder wanted them to take part only, they could take the reversion and leave part of the leasehold interest, i.e., the whole of the freeholder's interest and part of the leaseholder's. But we submit that on the true construction of the Act the local authority can only deal with a house as a whole. In the present case no part of the freehold will pass out of the Crown. The corporation will not acquire the fee; therefore they cannot take the leasehold interests. It is doubtful whether this Act enables the corporation to take land which belongs to the Crown.

[*R. J. Parker* referred to the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 116.]

Buckmaster, K.C., and *T. T. Method*, for the corporation. The real question in this case is whether this house is of such a character that the local authority can properly take part of it and not the whole. The effect of the agreements is this. The London County Council wished to widen Piccadilly, and by these agreements they have saved the public from great expense. All

(1) [1892] 1 Q. B. 190.

that was meant by the agreement to sell the rest of Denman House to the syndicate was that if the Act made it incumbent on the corporation to take more land than was actually wanted for the improvement, the surplus land should be dealt with in that way. Taking the strip might involve taking the whole house. By "powers under the Act" the parties meant powers properly exercisable under the Act. No obligation was thrown on the corporation to acquire land which could not properly be taken under the Act. The obligation was to exercise the power for the purpose of widening the street, and that might result in our having surplus land which we could sell to the syndicate. Therefore the only question is whether we must take the whole building or the owners can insist on our only taking part. There was a bona fide adjudication—no dishonest motive is shewn; therefore the notice to treat was valid. It has been held in *Pescod* v. *Westminster Corporation* (1) that these very agreements were bona fide and the adjudication an honest one.

The powers of the corporation depend upon the Act. They are not affected by the fact that the owner of the house wants to keep part or wants to sell the whole of it. We have power to acquire land for street widening, and the only question is how much. We have, on the authorities, no right to take part only of a house if that would prevent what is left from being substantially a house. In such a case we must take the whole. That is not altered by the owner saying that although we ought to take the whole he is content that we should take only a part. In such circumstances the power is really inoperative as to a part; it only extends to the whole, and it cannot be modified by the wishes of the owner. There are two cases against this contention: *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (2) —but the construction there put upon the Act is really in our favour—and *Aldis* v. *London Corporation* (3), where Kekewich J. said that this question was not before him, and that he must decide on the facts of that case. His Lordship relied on the motives of the owners, which have really nothing to do with the question; so it is obvious that his decision was not based on

(1) [1905] 2 Ch. 475. (2) 30 Ch. D. 642.
(3) [1899] 2 Ch. 169.

BUCKLEY J.
1906
J. L. DENMAN & CO., LIMITED v. WESTMINSTER CORPORATION.
J. C. CORDING & CO., LIMITED v. WESTMINSTER CORPORATION.

the statute. The wishes of the owners cannot affect the question, for there may be, as in the present case, many owners or occupiers of the house, and their wishes may be different. Under s. 80 we have to take the interests of the several owners and occupiers, i.e., the interests of each of them. The fact that the owner does not object to the workmen of the local authority coming on to the remaining part of the house to make the necessary alterations is not relevant; nor is the circumstance that the owner is ready to make the alterations himself. To avoid taking the whole it is necessary to leave a house. It is not enough that by building a wall the owner can make a new house. In this case we could not build the wall without coming on the remaining part of the house, and that proves that we must take the whole.

If we are right on the question whether a house will be left it will be useless to grant an injunction on the ground that the adjudication was invalid. The only result would be another adjudication and another notice to treat.

Sir R. B. Finlay, K.C., and *Gore-Browne, K.C.*, in reply.

Attwater held a watching brief for the hotel company.

Cur. adv. vult.

Feb. 7. BUCKLEY J. read the following judgment:—On the north side of Piccadilly, a short distance west of Piccadilly Circus, is a block of land bounded by Piccadilly, Air Street, Regent Street, and Piccadilly Place. The freehold is in the Crown. The plaintiffs in the first action, Denman & Co., Limited, are the Crown lessees of Denman House, Nos. 19 and 20, Piccadilly, which stands at the south-east corner of this block, with a frontage of 44 ft. 6 in. to Piccadilly, and a depth of about fifty-seven feet up Air Street. Denman House is an important building, which was erected by the plaintiffs, Denman & Co., two or three years ago, under a building agreement with the Crown, at a cost of 25,000*l.* Their lease is dated November 9, 1903, at a rent of 950*l.* a year, and their term extends to October 10, 1982. Denman & Co. occupy the shop in the western half of Denman House and some other part of the premises. The plaintiffs in the second action, Cording

& Co., Limited, are under-lessees of Denman & Co., and occupy the shop in the eastern half of the house and some portion of the basement and the whole of the mezzanine floor. They pay a rent of 1200*l.* a year. Their tenure is for seventy-nine years, less one day, from October 10, 1903, as to the principal part, and for twenty-one years from October 10, 1903, as to the rest of their portion of the premises. Both plaintiffs have carried on business upon this site for many years past—Denman & Co. for more than fifty years and Cording & Co. for more than thirty years. The premises are of great importance to them by reason of the fact that the site is for their purposes one of the best in London and that they have long carried on business there.

The London County Council and the defendants, the City of Westminster, have in contemplation a public improvement, namely, the widening of Piccadilly, by throwing into the street a strip which, at the eastern end of Denman House, will be of a width not exceeding (as near as may be) twenty-seven feet, and which may be not more than twenty-five feet, diminishing towards the western end of the house. There is no question but that the defendants are entitled to use their powers under Michael Angelo Taylor's Act for the purpose of acquiring such land as is necessary for this purpose. On June 10, 1905, the defendants served upon Denman & Co., and on June 26 on Cording & Co., notices to treat for their interests in the whole of Denman House. The question in these actions is whether these notices are valid. There are also sub-lessees under Denman & Co. of some other portions of Denman House. No notice to treat has yet been served upon them. They hold for short terms, and Denman & Co. state that they are in a position to control them all.

The St. James's Hall and Restaurant occupied a large part of the block in question. By their demolition and the demolition of the bulk of the surrounding buildings an opportunity has been afforded of erecting a large block of new property. The ground is now in process of being cleared. A syndicate was formed, and their successors, the Piccadilly Hotel Company, Limited, are desirous of erecting upon the whole block of land a large hotel,

BUCKLEY J.

1906

J. L. DENMAN & CO., LIMITED v. WESTMINSTER CORPORATION.

J. C. CORDING & CO., LIMITED v. WESTMINSTER CORPORATION.

and they hold an agreement from the Crown for a lease of the whole block, but subject, as regards Denman House, to Denman & Co.'s existing lease of November 9, 1903. The hotel company are desirous of obtaining possession of Denman House, pulling it down, and extending their hotel over so much of its site as is not thrown into the widening of Piccadilly. The plaintiffs in the actions, on the other hand, are desirous of retaining so much of the property comprised in Denman & Co.'s lease as is not required for the widening of the street.

The persons, other than the lessees and sub-lessees of Denman House, interested in the matter are four in number, viz., the Crown, the London County Council, the City of Westminster, and the syndicate, including in the latter their successors in title, the Piccadilly Hotel Company, Limited. These parties have entered into agreements, the short effect of which I proceed to state. The Crown has entered into two agreements—the one with the London County Council and the other with the syndicate, dated respectively October 26, 1903, and March 4, 1904. These effect two arrangements, viz.: first, an arrangement for the use of the statutory powers of Michael Angelo Taylor's Act for the acquisition of the strip of land which is required to be thrown into Piccadilly and the grant by the Crown to the London County Council of an easement over that strip for the purpose of the proposed widening of the thoroughfare; and, secondly, an agreement for a grant by the Crown to the syndicate of a lease of the rest of the block (that is to say, the whole block, less the strip which is to be thrown into the street), but as regards Denman House, subject to Denman & Co.'s lease, and there is an obligation in the syndicate to erect upon the block a high-class hotel at a cost of 200,000*l*. As regards Nos. 19 and 20, Piccadilly, the following provisions are material. The land to be thrown into the street is coloured light red; but as regards Nos. 19 and 20, Piccadilly, the rest of the site of those premises is coloured dark red. It is then provided that the syndicate shall pull down the buildings standing on the land coloured light red, other than Nos. 19 and 20, Piccadilly, or so much of Nos. 19 and 20, Piccadilly the leases of which shall not for the time being have been acquired and surrendered, and shall erect upon the said

premises, other than the sites of Nos. 19 and 20, Piccadilly (or so much of the dark red the leases of which shall not for the time being have been surrendered), new buildings, and shall, upon the expiration or sooner determination of Denman & Co.'s lease of Nos. 19 and 20, Piccadilly, pull down Denman House "upon so much of the site thereof of which they shall have obtained possession," and shall build upon it new buildings to be incorporated with the hotel. I call pointed attention to the fact that articles 1, 12, and 18 of this agreement of March 4, 1904, discriminate between the portions of Denman House which are respectively coloured light red (being part of the strip) and dark red (being back land lying beyond the limits of the widened thoroughfare), and, in fact, contemplate that, so far as compulsory powers are concerned, some part of Denman House may be within and other part without these powers. The syndicate have acquired the ground leases of a large part of the premises upon the block. They contract to surrender to the Crown these leases and any further like leases which they may acquire. The Crown is not a party to any arrangement by which any part of Denman & Co.'s leasehold property is to be acquired otherwise than by agreement, except so far as it is to be acquired for the purpose of the strip. On the contrary, article 4 of the agreement of October 26, 1903, contemplates that any back land—by which I mean land lying beyond the limits of the widened street—will be retained by the Crown, and the Crown are to have facilities for carrying out building operations upon it, and are to be provided with temporary bridges or ways for the purpose of access to it while the widening is in progress.

As between the London County Council, the City of Westminster, and the hotel company, the contractual rights are determined by three further agreements, dated respectively June 1, 1904, July 11, 1904, and June 6, 1905. The short effect of these is as follows: First, as regards the strip, the syndicate are to acquire the leasehold interests in it and surrender them, and thus enable the Crown to grant the easement which is required for widening the street. The powers of Michael Angelo Taylor's Act are to be used as a means towards that end. Secondly, the syndicate are to acquire, either by agreement, or

BUCKLEY J.

1906

J. L. DENMAN & CO., LIMITED v. WESTMINSTER CORPORATION.

J. C. CORDING & CO., LIMITED v. WESTMINSTER CORPORATION.

in default of agreement before a certain date then by use of the powers under Michael Angelo Taylor's Act, what are called the "unacquired interests." Of these the interest material for the present purpose is Denman & Co.'s term of years in Nos. 19 and 20, Piccadilly. The London County Council contract that they will, at the request of the syndicate, arrange with the City of Westminster to put in force the powers which that city may possess for the acquisition of the unacquired interests. These interests when acquired are to be assigned to the syndicate, subject to the rights of pre-emption which the Act creates. Thirdly, when all the unacquired interests have been acquired, the syndicate are to demolish the buildings, including Denman House. Fourthly, the City of Westminster contract, and pointedly by two separate articles as regards the strip and the back land respectively, that they will at the request of the council—(*a*) use their statutory powers to acquire the land the subject of the required easement; and (*b*) use their statutory powers to acquire the unacquired interests, including Denman & Co.'s leasehold, and, when they have acquired that property, will deal with it by assignment to the syndicate in manner above mentioned. Fifthly, the London County Council are to indemnify the City of Westminster, and the syndicate are to indemnify the London County Council against all purchase-money, costs, and so on, incurred in using the powers under Michael Angelo Taylor's Act. In the schedule to each of these three agreements Denman & Co.'s lease is specifically mentioned as a property which is to be acquired, and the last of the three, that of June 6, 1905, recites, as the fact was, that the hotel company had requested the London County Council to arrange with the City of Westminster to use their statutory powers to acquire (inter alia) that property. The land to be acquired for widening and the land to be acquired at the request of the syndicate are pointedly discriminated in article 3 of the agreement of June 1, 1904, and in articles 2 and 3 of the agreement of July 11, 1904.

At this point I pause to ask what was the purpose of providing that any powers of Michael Angelo Taylor's Act should be put in force at the request of the syndicate. For the public purpose of widening the thoroughfare, the defendants owed the public duty

of doing what was necessary to acquire all such land as was necessary for that purpose. There was no room for any request to be made by the syndicate or the hotel company as a preliminary to the local authority acquiring what was necessary for that purpose. But if the provisions as to request were addressed to the case of land which was not wanted for the purpose of the widening, they become intelligible. In any other case they are surplusage. Land necessary to be acquired for the purpose of the widening would include not only that which was actually to be thrown into the street, but that which, having regard to the circumstances of the case, it was necessary to acquire in addition, and which would be surplus land to be dealt with as provided by the Act. No request by the syndicate could be wanted or admissible to move the local authority to acquire all such land. These agreements, I think, intend a contract by the local authority that they will, at the request of the syndicate, use their statutory authority for the purpose of acquiring other and additional land for the purpose of throwing it into that which, under the bargain with the syndicate, was to be the subject of a new Crown lease in their favour for the purposes of the hotel.

These contracts having been executed, Messrs. Ashurst & Co., acting for the hotel company, wrote on March 9, 1905, to the London County Council referring them to the agreement of June 1, 1904, and stating that the hotel company desired to have the powers of the Act to acquire the interests in (inter alia) Denman House put into force at the earliest possible moment. Accordingly, on March 31, 1905, the London County Council wrote to the defendants asking them to put in force, on behalf and at the cost of the London County Council, their compulsory powers in respect of (inter alia) Nos. 19 and 20, Piccadilly, and suggesting that the Council's solicitor and the Council's valuer, Mr. Andrew Young, should be appointed to act for the defendants in the matter. They enclosed with their letter copies of the formal resolution which they desired to have passed. On April 6, 1905, the Westminster City Council passed the resolution in exactly the form submitted by the London County Council. They were invited to pass that resolution because they

BUCKLEY J. 1906 J. L. DENMAN & CO., LIMITED v. WESTMINSTER CORPORATION. J. C. CORDING & CO., LIMITED v. WESTMINSTER CORPORATION.

had contracted to pass it. In my opinion they passed it because they had contracted to pass it. I find no evidence that they exercised any independent judgment of their own in the matter. There has been called for the defendants no one who represented either the defendants or the London County Council in the matter to say that the defendants exercised any such judgment. Mr. Andrew Young, who was called, disclaimed responsibility. He actually said that he did not think it singular that the local authority should agree by the exercise of the powers of Michael Angelo Taylor's Act to get this land for the syndicate; it is, he said, a common thing to do. I am startled and shocked at this statement. The local authority are entrusted with statutory powers, to be used bona fide for the statutory purpose, and for none other. They have no right to seek to reduce the expense to the ratepayers by straining their powers in the interest of persons who desire to acquire the adjacent land from those who are the owners of it. The language of s. 80 of the Act is that, if any houses, walls, buildings, &c., or any part thereof shall be "adjudged," and so on. The defendants were in this matter exercising a power in its nature judicial. They were bound to form an honest judgment, after consideration of all the facts of the case such as I shall have to detail presently, whether the whole of Denman House or any part thereof was, or was not, necessary to be acquired bona fide for the purpose of widening Piccadilly. Their duty was to arrive at an honest decision in the matter, in the sense that, after considering the facts, they ought to have said whether they bona fide believed that the entirety or any and what part of the property was wanted—not necessarily for the purpose of throwing it into the thoroughfare, but bona fide for the purpose of carrying out the widening of the thoroughfare. If they have not accepted the responsibility of such a decision, and in that sense arrived at an honest adjudication, their decision is not binding. That was decided in *Gard* v. *London Commissioners of Sewers* (1) and *Lynch* v. *London Commissioners of Sewers*. (2) In my opinion the defendants did not so consider and adjudicate upon the matter, and their adjudication is not binding.

(1) 28 Ch. D. 486. (2) 32 Ch. D. 72.

I go on to consider whether, upon the facts of the case, this house was such that the defendants, who unquestionably were entitled to take part of it, were entitled to take the whole. The building, as I have said, was of a depth of fifty-seven feet. The strip will take off something less than an average of twenty-seven feet in the front, leaving a depth of thirty feet. The plaintiffs say that this reduced depth will allow of premises suitable for their businesses, and that they desire to retain that thirty feet and the building upon it, and not to be dispossessed of the site which is to them of so great value. As matter of construction, the building may be said to consist of two moieties, the line of division between which is, strangely enough, almost coincident with the line of the proposed new frontage in Piccadilly. The building and its floors are carried upon steel girders and steel joists. In the centre of the back moiety of the building is what is practically a tower of brickwork, composed of four walls enclosing the staircase and lift. The southern wall of this tower falls just north of the proposed new line of frontage. From this central tower there run steel joists, east and west from the tower to the external walls, and on the eastern part of the back moiety some steel joists run north and south from the first-mentioned steel joists to the north wall. This system of joists is self-contained in the back moiety of the house. The front moiety, which would be the part to be demolished, has a central pillar near the front wall which supports a long girder running east and west right across the building. The system of joists in this front moiety of the house runs north and south from the south wall to this girder and from this girder to the girders first above described, which run east and west from the central tower to the outer walls. The existence of the central tower in the back moiety of the house gives that moiety such a stability that there is no practical difficulty in demolishing the front part of the house, leaving the back half standing. The building is built in cement, which gives it large additional strength. The defendants' plans for widening the street include a canting off of the south-east angle of the building. This will create some difficulty. One stanchion in particular, in Air Street, being one of a series which support a long girder running at the level of the floor of the mezzanine

BUCKLEY J.

1906

J. L. DENMAN & Co., LIMITED v. WESTMINSTER CORPORATION.

J. C. CORDING & Co., LIMITED v. WESTMINSTER CORPORATION.

storey through the length of the building from north to south, will have to be removed. To allow of the removal of this stanchion it will be necessary to replace it by another stanchion lying rather more to the north. Further, the construction of the building, as regards some of the short joists at this point, and as regards an arch which is turned over the windows above the mezzanine floor, will require some readjustment, and it will, of course, be necessary to put a new front or south wall to the reduced building. The line of that wall would be substantially the line of the southern wall of the staircase tower, but really a little south of it. The short result of the facts is that upon the thirty feet of depth which are not wanted for the widening there is no difficulty in preserving, with a certain amount of reconstruction, so much of the building as stands on that thirty feet. I may add that there is an existing entrance in Air Street, at the north-east corner, which would be available to give access during the alterations.

In *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington* (1), and *Aldis* v. *London Corporation* (2) there is authority for saying that, where the landowner desires to retain part, the local authority cannot insist on taking the whole unless the remainder will be useless. There is, however, great difficulty in saying that the power of the local authority is to be determined by ascertaining ex post facto what the landowner desires, and the more so if the owner who expresses the wish is a limited owner. One limited owner might take one view and another another view. The freeholder might wish the whole to be taken; the leaseholder might wish to keep part. Upon this part of the case I do not rest my decision upon any principle to be deduced from those cases, to the effect that the power of the local authority is measured by the wish of the owner. But I think that the attitude which the owner takes up is not to be disregarded. The question to be decided is whether that which will be left will be a house. If the owner whose estate is in possession is desirous of doing upon his own land such work, by way of shoring and reconstruction, as that that which will be left will be a house, I think regard ought to be had to that fact. Under

(1) 30 Ch. D. 642. (2) [1899] 2 Ch. 169.

such circumstances the local authority in demolishing part will be leaving that which, having regard to the acts which the owner desires to do, will be a house available for him as a house. In every case where part of a house is demolished (say a porch or a cellar) some reconstruction will be required. The question cannot, therefore, I think, be answered by saying that the thing left will require some reconstruction before it will be complete as a house. The question is one of degree. Will there be so much left that a house will be left? In answering that question regard is, I think, to be given to the fact that the owner is willing to do what is necessary to make that which remains an effectual house. To my mind the question in these cases is one of fact, and largely one of degree. If the projected widening were such as to take eighteen inches off the frontage of a house sixty feet deep, it would, I think, be fallacious to argue that, inasmuch as it would be necessary to pull down the front wall, that which was left would not be a house, even when the owner whose estate is in possession is minded to erect a new front wall.

Upon the facts of this case I arrive at the conclusion that the local authority are not here entitled to take more than is wanted for the widening of the street, and that the thirty feet depth which will remain after the widening is not wanted, but is a building which can be and ought to be left as a house which the plaintiffs, who are its owners, desire to retain, and from which the defendants have no right to dispossess them for the purpose of putting the hotel company into possession. As regards *Pescod* v. *Westminster Corporation* (1) the relevant facts were different, and consequently the decision was different.

I find it unnecessary to express an opinion upon the argument which Mr. Gore-Browne addressed to me upon the question whether the local authority can, under this Act, acquire some only of the several interests in the premises which go to make up the fee simple. It is, I think, a question of difficulty, and I keep my mind open upon it until it shall be necessary to decide it. I think the plaintiffs are entitled to injunctions to restrain

(1) [1905] 2 Ch. 475.

BUCKLEY J. 1906 J. L. DENMAN & CO., LIMITED v. WESTMINSTER CORPORATION. J. C. CORDING & CO., LIMITED v. WESTMINSTER CORPORATION.

the defendants from proceeding upon the notices to treat. I grant those injunctions and order the defendants to pay the costs of the actions. There will, of course, be a separate judgment in each action.

Solicitors: *Hollams, Sons, Coward & Hawksley; Vallance & Vallance; T. W. Seager Berry; Ashurst, Morris, Crisp & Co.*

H. C. R.

THELLUSSON *v.* VISCOUNT VALENTIA.

[1905 T. 1086.]

JOYCE J. 1906 *Feb.* 8, 9, 12, 20, 21, 22.

Club — Rules — Power to Alter — Fundamental Objects — General Meeting — Resolution — Validity.

The H. Club was formed in 1868 with express powers to alter any of its rules by the resolution of a prescribed majority. The rules were accordingly altered from time to time, and the subsisting rule 2 read thus: "The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports surrounded with such accessories and so situated as to render it an agreeable country resort." Pigeon-shooting had been carried on at the club from its commencement down to 1905, prizes being given and competitions arranged by the committee. Polo and other sports had also been carried on for a shorter period. At a general meeting of the club held in May, 1905, a resolution was passed by the requisite majority that as from December, 31, 1905, pigeon-shooting should be discontinued at the club. The minority brought an action against the trustees and committee for a declaration that the resolution was null and void, insisting that it was not competent to the majority, under the guise of altering the rules of the club, to change its fundamental object:—

Held, that there was no fundamental rule that any particular sport should be provided; that what had been done was within the power of altering the rules; and that consequently no such declaration as was asked for ought to be made.

There is no rule of law that requires any company or other association to fulfil each and every separate purpose for which it was originally formed.

TRIAL OF ACTION.

The plaintiffs were members of a club called the Hurlingham Club. They brought this action on behalf of themselves and

other members of the club claiming (inter alia) a declaration that a resolution passed at the annual general meeting of the club on May 20, 1905, to the effect that pigeon-shooting should be discontinued at the club, was not binding on the members of the club and was null and void.

The defendants were the trustees and one member of the committee of the club.

The club was formed in 1868, its objects being thus stated in the original rules:—"Rule 2. The club is instituted for the purpose of providing a ground for pigeon-shooting surrounded with certain accessories, and so situated as to render it an agreeable country resort, not alone to those who take part in pigeon-shooting, but also to their families and friends." The original rules also contained express powers to alter any of the rules. These powers had been exercised from time to time, and in particular rule 2 had been altered, and now ran as follows:—

"Rule 2. The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports, surrounded with such accessories and so situated as to render it an agreeable country resort, not only to members, but also to their families and friends."

Rule 15 provided that there should be not less than three nor more than five trustees, to be chosen by the committee from the members of the club, in whose names, under the direction of the committee, all securities should be taken and investments made; the whole property of the club being, notwithstanding, subject to the disposition of the committee.

Rule 16 was as follows:—"All the concerns of the club and all arrangements for its management shall be conducted by a committee consisting of the trustees of the club and eighteen elected members. The committee shall have power to make and publish such by-laws (consistent with these rules) as they shall from time to time think necessary to the well-being of the club."

Rule 17 provided that six of the elected members of the committee should represent pigeon-shooting, six polo, and six the general purposes of the club.

Rule 22 provided that the annual general meeting should be held on or before the third Saturday in May for the purpose of

JOYCE J. 1906 THELLUSSON v. VISCOUNT VALENTIA.

receiving the report of the committee and the accounts, "and for discussing any proposals which might require the decision of a general meeting, and of which due notice had been given." The rule then proceeded: "(*b*) Proposals for adding to or altering the rules of the club, except by the committee, shall be considered and voted upon only at the annual general meeting, and no such proposition shall ever be adopted without the sanction of a majority consisting of two-thirds of the votes given at a meeting of at least fifty members. (*c*) No subject which does not relate to the management of the concerns of the club shall be proposed or brought forward for discussion at any general meeting of its members."

The property of the club, which was vested in the trustees, consisted of a house and extensive grounds situated at Fulham. Part of the grounds had always been set apart and used for the sport of pigeon-shooting, and prizes had been provided and matches arranged by the committee. It appeared that once a year an international pigeon-shooting contest was held at the club.

At the annual general meeting of the club, which was held on May 20, 1905, and at which upwards of 300 members were present and voted, the following resolution was duly passed by a majority consisting of upwards of two-thirds of the votes given thereat:—"Resolved, that pigeon-shooting be discontinued at the Hurlingham Club after December 31, 1905."

Upon the passing of that resolution the plaintiffs commenced this action.

Danckwerts, K.C., and *Sturges*, for the plaintiffs. Powers to make and alter rules for the governing of a club are necessarily subject to the implied condition that alterations made thereunder must be subsidiary, and must not purport or attempt to alter the fundamental principle of the foundation of the club. If the alteration proposed in this case is given effect to all the shooting members will be deprived of the facilities and benefits for which they contracted when they joined the club. There is no difference in principle between depriving a member of all the benefits to which he is entitled and turning him out altogether.

According to rule 2 the club was instituted for the purpose of providing a ground for pigeon-shooting. That must be regarded as the main object. It is true that polo and other sports have, since the institution of the club, been added to its objects. First, we submit that by general rules of construction a power to make and alter rules must be subject to not interfering, except by universal consent of the members, with the fundamental purpose and constitution of the club; and, secondly, that according to the true construction of rule 22, the power of altering the rules is limited to those which relate to the management of the concerns of the club. It is not permissible, under the guise of management, to manage the club out of existence so far as its main object and purpose is concerned. Although clubs are not partnerships, yet there is a certain analogy between them, and it has been laid down that it is not competent to partners to change the fundamental purpose of the partnership: *Natusch* v. *Irving* (1); *Pickering* v. *Stephenson*. (2) That principle is applicable to any association of persons, particularly when the purpose of the association is the provision, by the contributions of the members, of property to be enjoyed in a particular way. An analogous question was discussed in *Milligan* v. *Mitchell* (3), where Lord Cottenham L.C. said that the power of altering the regulations of an association (in that case the congregation of a Scotch Presbyterian chapel) did not extend to altering the fundamental principles upon which the association was formed: see also *In re St. James' Club*. (4)

This case is also analogous to the cases dealing with the objects of companies: *In re Haven Gold Mining Co.* (5); *In re German Date Coffee Co.* (6); *Stephens* v. *Mysore Reefs (Kangundy) Mining Co.* (7) Again, it is not competent to a majority of the members of a club, under the guise of management, to regulate it out of existence: *Toronto Municipal Corporation* v. *Virgo* (8); *Attorney-General for Ontario* v. *Attorney-General for the Dominion*. (9)

(1) (1824) 2 Coop. C. C. 358.
(2) (1872) L. R. 14 Eq. 322.
(3) (1837) 3 My. & Cr. 72.
(4) (1852) 2 D. M. & G. 383.
(5) (1882) 20 Ch. D. 151.
(6) (1882) 20 Ch. D. 169.
(7) [1902] 1 Ch. 745.
(8) [1896] A. C. 88, 93.
(9) [1896] A. C. 348, 363.

JOYCE J. 1906 THELLUSSON v. VISCOUNT VALENTIA.

It would be contrary to natural justice to deprive the minority of the advantages for which they have contracted: *Harington* v. *Sendall* (1); *Dawkins* v. *Antrobus*. (2) We ask for an injunction to restrain the defendants from acting upon or enforcing the resolution.

[They also referred to *Graff* v. *Evans*. (3)]

Younger, *K.C.*, and *Austen-Cartmell*, for the defendants. It is said that the alteration in rule 2 is one which it is not competent for any majority to pass, but we submit that the members of the club are bound by such rules as are prescribed by the majority. It is further said that no provision in the rules with regard to alteration can be directed to anything which is a fundamental purpose of the club. Here, with regard to alteration of rules, a member has the protection afforded by a two-thirds majority. The only limitation on the power of the majority is that they must act bona fide. Upon the construction of the rules the resolution is well within the competence of the majority to pass at a properly constituted general meeting: *Hopkinson* v. *Marquis of Exeter* (4); *Dawkins* v. *Antrobus* (2); *Walker* v. *London Tramways Co.* (5); *Andrews* v. *Gas Meter Co.* (6); *In re James Colmer, Ld.* (7); *Laing* v. *Reed* (8); *Fisher* v. *Keane* (9); *Labouchere* v. *Earl of Wharncliffe*. (10)

In *Harington* v. *Sendall* (1) there was no power to alter the rules. The argument is that the power of alteration does not extend to rule 2, but we submit there is nothing in the rules to shew that rule 2 is alone excepted. It cannot be said that there is anything fundamental in the rule. The various sports are means to an end, and no one of them constitutes in itself a fundamental object of the club. *Milligan* v. *Mitchell* (11) is no doubt reasonably near this case, but there is a marked distinction between them, because, as is shewn by the report in 1 My. & K., there was there an antecedent trust deed which was binding upon all parties.

(1) [1903] 1 Ch. 921.
(2) (1881) 17 Ch. D. 615.
(3) (1882) 8 Q. B. D. 373.
(4) (1867) L. R. 5 Eq. 63.
(5) (1879) 12 Ch. D. 705.
(6) [1897] 1 Ch. 361.
(7) [1897] 1 Ch. 524.
(8) (1869) L. R. 5 Ch. 4.
(9) (1878) 11 Ch. D. 353.
(10) (1879) 13 Ch. D. 346.
(11) 3 My. & Cr. 72; (1833) 1 My. & K. 446.

In *Pepe* v. *City and Suburban Permanent Building Society* (1) an alteration of the rules made subsequent to a notice of withdrawal was upheld as against the withdrawing member on the ground of contract. That was a very strong case, but it was expressly approved of in *Allen* v. *Gold Reefs of West Africa, Ld.* (2), and *Botten* v. *City and Suburban Permanent Building Society*. (3)

Cases in which the power of alteration in connection with companies is dealt with are collected in Palmer's Company Precedents, 9th ed. pt. i. pp. 524—528. The Courts are very careful not to interfere with matters of internal management. There is only one case in which an action framed in this way has been brought—*Harrison* v. *Marquis of Abergavenny* (4)—and that came to an abortive conclusion. Assuming, however, that the resolution is ultra vires, then we say that the plaintiffs' remedy is in damages only, and an action for damages by a representative plaintiff suing on behalf of himself and others will not lie. The Court will not grant an injunction when it cannot decree specific performance of a contract, except where there is an express negative term: Fry on Specific Performance, 4th ed. p. 495, § 1151; *Fothergill* v. *Rowland*. (5)

Danckwerts, K.C., in reply. The position of a Court of Equity in connection with interference in such a case as this is shewn in *Rigby* v. *Connol* (6) and *Baird* v. *Wells*. (7) The interference of the Courts as regards clubs is founded on the existence of the right of property in the member. Where a right to property or the enjoyment of property is held under a title which is liable to variation in a particular way, it must necessarily be taken subject to that; but unless there be that liability to variation of the title, it cannot be varied except by common consent: *Allen* v. *Gold Reefs of West Africa, Ld.* (2) If the resolution does not alter the rules, then the majority cannot deprive the plaintiffs of their rights so long as rule 2 stands: *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson*. (8) There is no difference in

(1) [1893] 2 Ch. 311.
(2) [1900] 1 Ch. 656.
(3) [1895] 2 Ch. 441.
(4) (1887) 57 L. T. 360.
(5) (1873) L. R. 17 Eq. 132.
(6) (1880) 14 Ch. D. 482, 487.
(7) (1890) 44 Ch. D. 661.
(8) (1882) 23 Ch. D. 1.

JOYCE J. 1906 THELLUSSON v. VISCOUNT VALENTIA.

principle between the actual expulsion of a member and depriving him of the benefits and privileges of the club. The resolution is ultra vires, because it is an attempt to deprive the plaintiffs of an enjoyment to which, under the existing rules, they are entitled. The property of the club was provided at the cost of the members for the purposes of the club, as defined by rule 2. The main object was pigeon-shooting, everything else being accessory. The trustees hold the property upon trust, to be enjoyed for the specified purpose. No contract has been shewn enabling the majority to alter the enjoyment of the property.

Stephens v. *Mysore Reefs* (*Kangundy*) *Gold Mining Co.* (1) and *Pickering* v. *Stephenson* (2) shew how the rules should be construed, viz., that the object, as defined by rule 2, must be treated as fundamental, and that the other rules are ancillary to that object. The same principle is applied in the case of ordinary partnerships: Lindley on Partnership, 7th ed. p. 441. Applying that principle, rule 22 does not enable an alteration of the objects of the club. Rule 2 is not really a rule properly so called for that purpose. That is made clear by rule 22 (*c*), which prohibits the proposal at a general meeting of any subject which does not relate to the management of the concerns of the club. If such a subject cannot be proposed a fortiori, it cannot be resolved upon. That is the restriction upon the power to alter the rules.

[*Younger*, *K.C.*, referred to *Taylor* v. *Pilsen Joel and General Electric Light Co.* (3)]

Cur. adv. vult.

Feb. 22. JOYCE J. The Hurlingham Club was formed in the year 1868, with rules containing an express power, or powers, to alter any of the rules by a two-thirds majority. That appears by rule 30, which provides, among other things, that general meetings shall be held for certain purposes, and for receiving propositions for any new rule or alteration of any existing rule of the club; and then follows a provision as to the requisite majority. Then rule 31 provides that: "If at any other time it shall appear expedient to adopt any new rule or alter any old one or to make

(1) [1902] 1 Ch. 745. (2) L. R. 14 Eq. 322.
(3) (1884) 27 Ch. D. 268.

any other proposition which may appear to require the sanction of a general meeting, the committee may call an extraordinary general meeting." The second rule of the club was to this effect: "The club is instituted for the purpose of providing a ground for pigeon-shooting, surrounded with certain accessories, and so situated as to render it an agreeable country resort, not alone to those who take part in pigeon-shooting, but also to their families and friends." Every member, then, who has joined this club has joined it subject to the existence of such a power of altering the rules as I have mentioned, and with full notice of all the provisions of the rules, even if he would not otherwise have had it by virtue of the 60th rule, which provides that: "These rules and regulations shall be printed, and a copy of them shall be delivered to every member of the club or transmitted to his address; but no member shall be absolved from the effect of these rules on any allegation of not having received them."

Now, this power of altering the rules has been exercised from time to time, and the rules as they now stand are to be found in the edition of 1904, which embodies the result of all the alterations which have been made, including the alteration of rule 2, which now stands: "The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports, surrounded with such accessories, and so situated as to render it an agreeable country resort," and so on. It is common ground on both sides that these rules of 1904 (they are not really of 1904, I think, but of 1903 or 1902, but they appear as printed in the book to be of 1904) are to be taken to be the subsisting rules, and I see no reason whatever to doubt that each and every one of these rules in the book of 1904 is valid and binding. I have read rule No. 2 as it appears in this book. Rule No. 16 provides that: "All the concerns of the club and all arrangements for its management shall be conducted by a committee," and so on, and "the committee shall have power to make and publish such by-laws as they shall from time to time think necessary to the well-being of the club." The old power to alter rules is continued in a somewhat modified form so far as language is concerned, not really in effect, by rule 22 (*b*),

JOYCE J. 1906 THELLUSSON v. VISCOUNT VALENTIA.

and in the by-laws made by the committee it is provided, among other things, that: "The shooting ground shall be such portion of the club premises as the general committee for the time being shall determine." Generally, it appears to me that the effect of the rules is that the management of the concerns of the club is with the committee, subject, of course, to the control of general meetings of the club.

Now, in the year 1868, when this club was formed, I suppose that the practice of shooting pigeons from traps was considered a manly sport fit for gentlemen. Since 1868 times and manners have changed, people are more humane, and now many not altogether irrational persons rightly or wrongly, as to which I say nothing, consider the practice of shooting pigeons from traps, as practised at Hurlingham, to be a barbarous pastime, and, if legal, at all events not very creditable to the club. Consequently I think no one could have been surprised to learn some time ago that at a recent general meeting a resolution had been passed by the requisite two-thirds majority directing that as from a certain date the practice of pigeon-shooting should be discontinued, and this is an action brought by a minority of the members of the club asking to have it determined in effect that that resolution is null and void. Generally, the objection to the resolution is that it is incompetent for any majority of this club, however large, to alter rule 2. In fact, the terms of the resolution did not purport to alter the rules. Still, I cannot conceal from myself that the resolution is, in some respects, inconsistent with certain of the by-laws, and I think it is inconsistent with certain of the provisions of the rules. I refer particularly to the rules with reference to the election and constitution of the committee. This inconsistency might, however, I think, be set right by a very few amendments of the rules, and possibly without in terms altering rule 2. But I consider the real question submitted to me, and which I have to decide, is this: Whether, having regard to the specific mention of pigeon-shooting in rule 2, this resolution of the general meeting is, on the face of it, invalid, necessarily, whatever may have been the circumstances under which it was passed?

There is nothing in the rules prescribing what expenditure or

other provision is to be made for the pigeon-shooting, but the practice has been to give prizes and make various arrangements to facilitate, and I think I may say encourage, this sport. But there is no sort of obligation on the committee or on the club to give such prizes, or to invite "all sorts of foreigners" (I am simply using Mr. Danckwerts' expression) to the international three days, which, I believe, occur once a year. The committee, if so advised, might discontinue all those prizes, and instead of making such arrangements as would encourage the practice of pigeon-shooting, they might (I think it is well within their powers) make arrangements which would at all events tend to have the contrary effect. If they have power to give prizes at all, it is within their discretion to give prizes for any other sport in preference to this.

Now, on consideration, it appears to me that this resolution at least authorizes, if it does not oblige, the committee to adopt some such course as I have indicated, that is, not to encourage pigeon-shooting, and if and so far as may be necessary to alter the by-laws accordingly. To that extent at least I think this resolution is valid, and may be acted upon by the committee with perfect propriety. How, then, can I say that this resolution is manifestly null and void, or that the committee is not to recognize it? Under no circumstances whatever can the Court positively prescribe what arrangements or by-laws the committee are to make. The Court cannot manage a club any more than it can manage a partnership, and there is no jurisdiction to give any such positive directions as I have just mentioned, even though it may be in the power of the Court to forbid the violation of any particular rule.

But is the resolution necessarily invalid at all? It does not propose to divert any of the funds of the club to an unauthorized object. That would be illegal, and of course could not be allowed, and might be restrained by injunction. Rule 2 does not limit the club to the single object of pigeon-shooting; it describes a numerous class of objects, "for the purpose of pigeon-shooting, polo and other sports." It is notorious that lawn tennis and, I think, some other sports are carried on there. It appears to me to be for sports generally: or, if there be

JOYCE J. 1906 THELLUSSON v. VISCOUNT VALENTIA.

any limitation, it is limited to such sports as may be carried on at such a place, and, to use the words of the rule, are calculated to make the place "an agreeable country resort." If pigeon-shooting were to be made illegal by Act of Parliament it appears to me that the existence of the club would not be affected in the least; there would be the other sports and amusements of the class prescribed in rule 2, and no case has been cited to me, and I am not aware of any rule of law that requires any company or other association to continue to fulfil each and every separate purpose for which it was originally formed. If pigeon-shooting were dropped the club might, in my opinion, still effectually fulfil its general purpose as laid down in the rules. Therefore, if some particular one of the class of sports indicated in rule 2 should drop completely out of fashion or become discreditable and its continuance injurious to the general welfare of the club, why may not the members, acting bona fide by resolution passed with the requisite majority and with appropriate amendments, if necessary, of the rules, discontinue the practice of that particular sport?

I have come to the conclusion that, with rules framed as these are and always have been, this may be done, and notwithstanding the present form of rule 2. If there be any limit in law to the power of altering the rules I am of opinion that that limit has not been transgressed. In truth, every member has joined under rules containing provisions for the alteration of any rule by a two-thirds majority. In my opinion none of these rules are so fundamental, whatever may be the meaning or effect of that expression, as to exempt them from any addition or alteration and at all events there is no fundamental rule, in my opinion, that any particular sport should be provided. The trustees do not, as was argued before me, hold the ground upon a special or any trust to allow pigeon-shooting to be carried on there; they hold generally upon trust for the club, and subject to the direction of the committee. Those are the express provisions of rule 15.

Therefore, without going so far as to say that this resolution is absolutely valid and binding until some corresponding alterations have been made in the rules, I have come to the conclusion that

JOYCE J.
1906
THELLUSSON v. VISCOUNT VALENTIA.

I ought not to make any such declaration as is asked for, and in my opinion this action fails and must be dismissed.

The committee and trustees will take their costs, as between solicitor and client, out of the funds of the club. The plaintiffs will pay their own.

Solicitors: *William Sturges & Co.; Nussey & Fellowes.*

G. A. S.

WARRINGTON J.
1906
Jan. 23, 30.

In re MERCANTILE LIGHTERAGE COMPANY, LIMITED.

[00338 OF 1902.]

Practice—Company—Costs—Taxation—Disbursements—Professional Charges—Omission from Bill of Items of Costs already taxed—Reduction by One-sixth—Rules of Supreme Court, Order LXV., r. 19 H; r. 27, sub-r. 38 B—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 38.

Under an order that the costs, charges, and expenses of a retiring liquidator should be taxed and provided for, he carried in a bill shewing disbursements and professional charges in separate columns. Amongst the latter he included and gave credit for two bills of party and party costs which had been taxed some time previously and paid to him by a third party. The registrar, on the ground that they had already been paid, struck out these items, with the result that the total amount of the costs was diminished. He proceeded to tax the bill on the footing that it must be treated as a whole and the disbursements and professional charges added together; and he thus reduced it by more than one-sixth. Items for drawing the bill of costs and attending the taxation were accordingly disallowed:—

Held, that the bills for party and party costs were properly included, and ought not to have been struck out of the bill; and that for the purpose of ascertaining whether one-sixth had been taxed off the bill the amount of the professional charges only (omitting the disbursements) must be taken into consideration.

SUMMONS for review of taxation.

On May 5, 1905, an order was made which recited that Richard Wood, the liquidator in the voluntary winding-up of the Mercantile Lighterage Company, Limited, had submitted to retire from his office of liquidator, and directed that his costs, charges, and expenses (as between solicitor and client) properly incurred

WARRINGTON J.
1906
MERCANTILE LIGHTERAGE COMPANY, LIMITED, *In re.*

in the voluntary winding-up should be taxed, ascertained, and provided for; and a new liquidator was appointed. Mr. Wood accordingly carried in a bill of costs shewing in separate columns disbursements 239*l.* 3*s.* 6*d.* and professional charges 563*l.* 9*s.*, amounting in the whole to 802*l.* 12*s.* 6*d.*

The registrar struck out of the professional charges items for "amount of liquidator's party and party costs taxed under order of November 25, 1902, and for which amount credit will be given 162*l.* 13*s.* 4*d.*," and "the like under order dated June 10, 1904, and for which credit will also be given 9*l.* 4*s.* 6*d.*" These items represented costs of litigation in which Mr. Wood had been successful and had been paid his party and party costs. The registrar said that these items ought not to be included because they had already been paid, and he struck them out of the bill. He then proceeded to tax the bill as reduced, and disallowed items to the amount of 139*l.* 2*s.* 5*d.*, of which 77*l.* 0*s.* 10*d.* represented professional charges and 62*l.* 1*s.* 7*d.* disbursements. He treated the bill as a whole by adding together the disbursements and professional charges, with the result that more than one-sixth was taxed off. It followed from this that Mr. Wood was not entitled to his costs of the taxation, and items of 18*l.* 6*s.* for drawing the bill and 7*l.* 6*s.* 8*d.* for attending the taxation were accordingly disallowed.

Mr. Wood now applied for an order to review the taxation.

T. L. Wilkinson, for the summons. The registrar ought not to have struck out the 162*l.* 13*s.* 4*d.* and the 9*l.* 4*s.* 6*d.* It is the invariable custom to insert such items in a bill delivered in compliance with such an order as that of May 5, 1905, and it is necessary to do so in order to shew the client what the total amount of the bill is, and what has been received in respect of party and party costs: *Mills* v. *Revett* (1); *Waller* v. *Lacy* (2); *Pigot* v. *Cadman*. (3) It may be said that we ought to have inserted all the items of those bills, but it is usual only to state the amount. The bills themselves are present and can be looked at if necessary on the taxation. If these two items remain in the

(1) (1834) 1 Ad. & E. 856. (2) (1840) 1 Man. & G. 54.
(3) (1857) 26 L. J. (Ex.) 134.

bill the professional charges have been reduced by less than one-sixth.

The registrar has treated the bill as a whole, and disallowed our costs of the taxation on the ground that more than one-sixth has been taxed off. But the bill ought not to be treated in that way; it is drawn up in the usual manner, in two columns—one of disbursements and the other of professional charges. It is only the disallowances in the latter column which can be taken into consideration for the purpose of ascertaining whether one-sixth has been taxed off. The principle on which this taxation proceeds is settled by the Rules of the Supreme Court, Order LXV., r. 19 H; r. 27, sub-r. 38 B. A distinction is drawn between disbursements and professional charges by r. 19 H, which directs that professional charges and disbursements shall be in separate columns.

By r. 27, sub-r. 38 B, the solicitor loses his costs of the taxation if the bill is reduced by one-sixth, and the rule preserves the distinction and provides that the practice shall apply to professional charges only. The registrar has followed what is alleged to be a settled practice and treated this bill as a whole in the same way as if it had been delivered under s. 37 of the Solicitors Act, 1843, but that section in terms applies to bills of fees, charges and disbursements, and has nothing to do with a taxation under these rules: *Cunningham* v. *M'Donagh*. (1) In that case *In re Remnant* (2) was referred to, but it only decided what particular class of payments ought to be included in disbursements. The so-called general practice is inconsistent with the rules and cannot be relied on. The bill has not been reduced by one-sixth, and our costs of the taxation ought to be allowed.

J. D. Israel, for the liquidator. The cases which have been cited do not apply to a taxation under the Rules of the Supreme Court, Order LXV., r. 27, sub-r. 38 B, and it is not reasonable to include the party and party costs. Under the order of May 5, 1905, the liability is only for what is left outstanding, so it cannot be right to insert the whole amount of the old bills. On the other point, there is a well-established rule that on taxation the disbursements and professional charges must be added together

(1) [1904] 2 I. R. 417. (2) (1849) 11 Beav. 603.

WARRINGTON J.
1906
MERCANTILE LIGHTERAGE COMPANY, LIMITED, *In re.*

and the bill treated as a whole. At all events, that is so in the present case, for the liquidator is a person liable to pay the bill within s. 38 of the Solicitors Act, 1843: Cordery on Solicitors, 3rd ed. p. 325. The taxation is therefore under that Act, and under s. 37 disbursements ought to be taken into consideration.

WARRINGTON J. said that he would consult the taxing masters before giving judgment.

Cur. adv. vult.

Jan. 30. WARRINGTON J. This is a summons for the review of a taxation, and raises two somewhat important questions of principle. The applicant is a gentleman who was formerly liquidator of the company. By an order dated May 5, 1905, the applicant submitting to retire, it was ordered that his costs, charges, and expenses as between solicitor and client properly incurred in the winding-up should be taxed and provided for, and a new liquidator was appointed, and the applicant was to be at liberty to apply for payment of his costs, &c., when taxed.

Certain costs of the applicant as liquidator had been previously ordered to be taxed as between party and party, and to be paid by a third person. They were so taxed and paid. In carrying in his bill in the present taxation the applicant included therein the party and party costs so taxed and paid, giving credit, of course, for the amount he had received. The registrar, in taxing the costs under the order of May 5, has struck out both the charge and the credit, on the ground that it was improper (being unnecessary) to include the party and party costs. This affects the proportion taxed off, and is thus of importance.

The order is to tax, not the difference between the party and party and the solicitor and client costs, but the costs as between solicitor and client, and I should have thought, independently of authority, that this means the whole costs, and not merely so much as has not already been paid. But the form in which the bill has been carried in is in accordance, as I understand, with the long-established practice of the Taxing Office, which practice rests on the authority of several cases, of which

Waller v. *Lacy* (1) is one example. Tindal C.J. on this point says (2): "The third question is whether the charges in respect of extra costs are sufficiently stated; and it appears to me they do not comply with the requisites of the statute. Those charges by themselves are not intelligible to the officer of the Court. An attorney's bill, generally speaking, ought to give a history of the cause, so as to enable the officer to judge of the propriety of the various items of which it is composed; but if part only of the charges are set forth he has not sufficient materials whereon to form his judgment. A delivery of a bill containing merely the extra costs is certainly not according to the general practice, which is for the attorney to deliver a bill of the whole costs, giving his client credit for the sum that has been received. Here these separate and disjoined items do not furnish the necessary information, and are consequently not a sufficient compliance with the statute, which requires a bill to be delivered for the purpose of enabling the client, should he think proper, to have it taxed." It has been suggested that this and the other cases are confined to taxation under the Solicitors Acts. I can see nothing to limit their application to such taxations, and the reasons given by Tindal C.J. apply as much to taxations such as the present as to taxations under the Act. There seems to be no valid objection to the mode in which the costs taxed and paid are included, viz., in a lump sum. This is also in accordance with the usual practice. For these reasons I think the registrar was wrong in the course he took, and I allow the objection as to items 3 and 4.

The other objection is this: The registrar, purporting to act under Order LXV., r. 27, sub-r. 38B, has disallowed the costs of drawing and copying the bill and of attending the taxation. Order LXV., r. 27, sub-r. 38B, is as follows: "If on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges contained in the bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation for drawing and copying it, nor for attending the taxation." The registrar for the purpose of arriving at the

(1) 1 Man. & G. 54. (2) 1 Man. & G. 69.

WARRINGTON J.
1906
MERCANTILE LIGHTERAGE COMPANY, LIMITED, *In re.*

sixth part has added to the professional charges the amount of the disbursements. In doing so he has followed the settled practice of the Taxing Office, though I understand if he had felt himself at liberty to act on his own construction of the rule he would have taken a different course.

Is the practice in accordance with the true construction of the rule? The question turns on what is the meaning in the rule of "the professional charges contained in the bill." In the same Order LXV., r. 19H, it is provided: "In every bill of costs the professional charges shall be entered in a separate column from the disbursements, and every column shall be cast before the bill is left for taxation." This shews that in the Order "professional charges" has a meaning of its own distinct from, and indeed contrasted with, "disbursements," and, speaking for myself, I can see no doubt or ambiguity in the matter, and I think the sixth should be arrived at by taking the "professional charges" by themselves without regarding the disbursements. This is in accordance with the Irish case of *Cunningham* v. *M'Donagh*. (1)

As, however, I found that the contrary practice was established, I requested Master Shearme to furnish me with a memorandum as to its origin. This I have received. The fact appears to be that sub-r. 38B, as first published in May, 1889, contained, after the words "professional charges," the words "exclusive of disbursements." The words "exclusive of disbursements" were afterwards struck out, and the rule of June, 1889, was signed as it now appears. In my opinion, even if I were entitled to look at the rule of May, 1889, in order to construe the rule now in force (which I do not think I can) it would not help me. The words omitted did not really alter the sense, and I could only conclude that the committee struck them out as redundant and in the interests of good draftsmanship. But I am also informed by the taxing masters that the Law Society made representations to the Lord Chancellor upon the rule as first drawn, with the object of having disbursements included for the purpose of arriving at the sixth, and that the intention of the Rule Committee in altering the rule was to give effect to these representations. These are matters to which I am not entitled to listen.

(1) [1904] 2 I. R. 417.

I must take the rule as it stands, and say what it means. As to this I have already expressed my view, and I must therefore allow this objection also and refer the taxation back to the registrar accordingly. I need not say that I have been reluctant to interfere with a practice which has been so long established, but when there is, as I think, a plain construction of a rule, I consider it my duty to give effect to it. If the rule so construed is not in accordance with the intention of the Rule Committee, it is open to them to alter it.

WARRINGTON J. 1906 MERCANTILE LIGHTERAGE COMPANY, LIMITED, *In re.*

Solicitors: *Atkinson & Dresser; Walter B. Styer.*

H. C. R.

In re BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

WARRINGTON J. 1906 *Jan.* 24, 25, 26; *Feb.* 6.

[1902 B. 3355.]

Company—Receiver and Manager—Authority to borrow limited Sum for General Purposes of the Business—Limit exceeded—Indemnity—Priority over Debenture-holders.

Orders were made in a debenture-holders' action appointing a receiver and manager, and authorizing him to borrow 3000*l.* for the general purposes of the business, the sum to be a first charge on the assets. The company was ordered to be wound up. The manager carried on the business and incurred debts beyond the 3000*l.*, but made no further application for leave to raise money. He retired from his office, and the plaintiffs in the action applied for a declaration that he was not entitled to any indemnity in respect of liabilities incurred beyond the 3000*l.*, or that if he was so entitled he had by his conduct forfeited his rights:—

Held, that the order authorizing him to borrow for the general purposes of the business had not deprived the manager of his right to be indemnified out of the assets; that if without any application to the Court he had incurred further liabilities he would only be entitled to be indemnified in respect of them so far as he could shew that having regard to all the circumstances he was justified in incurring them without leave; that this must be separately determined in each particular case;

WARRINGTON J.

1906

BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED, *In re.*

HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

and that it would not be enough for him to shew that the further liabilities had been incurred bona fide and in the ordinary course of business.

ADJOURNED SUMMONS.

This was an application by the plaintiffs in a debenture-holders' action for a declaration that Herbert Watkins, the retired receiver and manager of the company, was not entitled to be indemnified out of the assets of the company in respect of the claims of various creditors made against him as receiver and manager, or that the respective priorities of the various classes of creditors of H. Watkins in the assets of the company might be ascertained.

The facts were stated by Warrington J. as follows:—

By an order in the action dated August 27, 1902, Herbert Watkins was appointed receiver of the undertaking and property of the defendant company and to manage its business, but he was not to act as such manager after December 30, 1902, without the leave of the judge. By an order of August 28, 1902, it was ordered that for the purpose of paying the current week's wages and the amount due for gas, as mentioned in an affidavit of Mr. Hodgson therein referred to, the manager was to be at liberty to raise on mortgage of the assets of the defendant company a sum not exceeding 750*l.* at interest at a rate not exceeding 5*l.* per cent. per annum, and that such money, when raised, and interest was to be a first charge upon the assets of the defendant company and all the property and effects included in the debentures.

By a further order dated September 4, 1902, it was ordered that the manager was to be at liberty to raise on mortgage of the assets of the defendant company such a sum as with the sum of 750*l.* in the order of August 28, 1902, referred to, would not exceed 3000*l.*, with interest at a rate not exceeding 5*l.* per cent. per annum, and it was ordered that such money, when raised, and interest, was to be a first charge upon the assets of the defendant company and all property and effects included in the debentures. This order, as well as that of August 28, was made upon the affidavit of Mr. Hodgson; and from that it appears clearly that except the 750*l.* mentioned in the order of August 28,

the money was required for the ordinary current expenses of carrying on the business of the company.

On September 4, 1902, a petition for winding up the company was presented, upon which a winding-up order was made on December 16. Meanwhile judgment was obtained in the action on November 29. On December 15 leave was given to the manager to carry on the business till January 13, 1903, and on January 14, 1903, further liberty to carry on the business for a period of three months was given. Each of the applications on which leave was so given was supported by an affidavit of the manager. No application was, on either of these occasions, or at any other time, made for leave to borrow any further sum or to incur any further liability.

On February 11, 1903, an order was made by which, after stating that Herbert Watkins desired to retire from his office of receiver and manager and consented to the order, one George Pepler Norton was appointed receiver and manager, and it was ordered that he should forthwith, out of any assets coming to his hands, other than money borrowed by him for payment of wages as thereinafter authorized, pay the debts, if any, of the company which might have priority over the claims of the debenture-holders, and make provision for paying the liabilities properly incurred by the said H. Watkins as receiver and manager. By the same order Watkins undertook within ten days to lodge his first and final account. The order contained other directions not material for the purposes of this judgment.

On February 13, 1903, Watkins left the country and took with him 465*l.*, the moneys of the company, insisting that he was entitled to retain that sum for his indemnity. Watkins did not lodge his account as directed by the order of February 11, and on March 2, 1903, the registrar directed the new receiver to make out such an account of the receipts and payments of Watkins as he could. By an order of March 10, 1903, it was ordered that the new receiver and manager should be at liberty to raise on mortgage of the assets of the defendant company such sum or sums, not exceeding in all 1000*l.*, as he might think necessary, with interest as therein mentioned, and that such moneys when advanced with interest should be a charge on the

WARRINGTON J.

1906

BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED, *In re.*

HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

assets of the defendant company ranking immediately after any moneys, not exceeding in all 3000*l.*, borrowed by the said Herbert Watkins pursuant to the leave given to him by the orders of August 28, 1902, and September 4, 1902; but, subject to the direction as to the priority of the sum or sums thereby authorized to be borrowed thereinbefore contained, the order was to be without prejudice to any right of Barclay & Co., Limited, to obtain repayment out of the assets of the defendant company in priority to the debenture-holders of any sum in excess of the said sum of 3000*l.* which they might have lent to the said Herbert Watkins as receiver and manager. Barclay & Co. were the bankers of the former manager, and he had borrowed from them the 3000*l.* authorized by the order of September 4 by means of an overdraft. He had overdrawn his account to the extent of 1500*l.* in addition. It is this excess in the overdraft to which the order refers.

On May 5, 1903, the account of the receipts and payments of Watkins as prepared by Norton under the directions given on March 2 was filed, whereby it appeared that the total overdraft was 4500*l.*, and that there were, in addition, outstanding debts to a considerable amount. Subsequently directions were given for the winding up of the business and a sale of the assets. These are now represented by a sum of about 8700*l.* consols and a sum of about 50*l.* cash in court.

By an order dated July 19, 1904, two inquiries were directed —first, what creditors there are in respect of debts and liabilities incurred by Watkins as receiver and manager, and what are the amounts due to such creditors respectively; and, secondly, whether the said Herbert Watkins, as such receiver and manager, is entitled to be indemnified out of the assets of the defendant company in respect of the said debts and liabilities or any of them, and, if so, to what extent.

By an order of July 26, 1904, it was declared that Barclay & Co. were entitled, in priority to all the holders of the debentures issued by the defendant company, to a charge on the assets of the defendant company for 3000*l.* with interest as therein mentioned, being the amount borrowed in pursuance of the orders of August 28, 1902, and September 4, 1902; but that order was

to be without prejudice to any question as between Barclay & Co. and the creditors in the order mentioned whether the charge thereby declared was in priority to any right of indemnity out of such assets to which the said Herbert Watkins might be found to be entitled, and also to the rights, if any, of his creditors claiming the benefit of any such indemnity, and also without prejudice to the right, if any, of Barclay & Co. to claim the benefit of such indemnity as one of such creditors. Under the inquiry directed by the order of July 19, 1904, claims have been carried in for sums amounting to upwards of 6000*l.* in addition to the authorized sum of 3000*l.* Watkins has returned to this country and has been adjudicated bankrupt. It has been thought convenient that the Court should settle the principle upon which the alleged right of Watkins to an indemnity and the consequent right of his creditors to be paid out of the assets of the company should be determined before the registrar proceeds to consider the details of the several claims. The present summons has accordingly been issued.

Norton, K.C., and *Percy Wheeler*, for the debenture-holders. The creditors of Watkins are not entitled to priority over us. Their claim is based on the indemnity to which he is alleged to be entitled. But Watkins was appointed receiver and manager by the Court, and after he had obtained leave to borrow up to a certain limit for the general purposes of the business, he could not pledge the assets beyond that amount and give his creditors a first charge without further leave. If no limit had been fixed it would have been his duty to carry on the business and make for that purpose contracts for which he would have been personally responsible; and he would have been entitled to be indemnified out of the assets against all liabilities properly incurred in so doing. But he lost this right when a limit was imposed. This result might not have followed if the leave to borrow had been given for a specific purpose; but this leave was given for general purposes, and if Watkins wanted to raise more money he ought to have applied to the Court for leave to do so. There was no other object which the Court could have had in view in fixing a limit. There is no reason for asking the Court

WARRINGTON J.
1906
BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED, *In re.*
HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

for leave to borrow if a manager can, after obtaining leave for a limited amount, incur further debts to an unlimited extent. The limit of 3000*l.* is analogous to the limit fixed by Chitty J. in *Taylor* v. *Neate* (1), where he made an order that the manager should not enter into contracts involving a greater liability than 200*l.* That case was approved in *Burt, Boulton & Hayward* v. *Bull* (2), where it was stated to be the rule that unless there was something to shew that this was not intended, a manager appointed by the Court must carry on the business, and for that purpose enter into contracts for which he was personally liable, but for which he was entitled to be indemnified out of the assets. Originally a receiver and manager could not incur liabilities and claim to be indemnified: *Morris* v. *Elme* (3); *Thornhill* v. *Thornhill* (4); but there can be no doubt that he can do so now and the Court has power to impose a limit; and when that has been done the manager knows that his indemnity is limited to a similar amount. It is true that although a limit was imposed the managers were allowed their indemnity for liabilities beyond the limit in *Strapp* v. *Bull, Sons & Co.* (5), but that was because they were appointed to carry out particular contracts, and the liabilities were all incurred in relation to contracts which were subsidiary to the main contracts, not in carrying on the general business of the company. This point was not raised, and that is the only case in which a manager has been allowed an indemnity for liabilities incurred by him in excess of a limit imposed by the Court. Even if Watkins had acted in the most proper manner, he would not be entitled to be indemnified beyond the 3000*l.* If a testator directs that a certain portion of his estate shall be used in carrying on his business, his trustees will be personally liable if they exceed the limit: *Ex parte Garland.* (6)

Secondly, we submit that, whatever may be the rights of a manager in ordinary cases, Watkins has behaved in such a manner that he is not entitled to any indemnity beyond the 3000*l.*

Buckmaster, K.C., and *Hon. Frank Russell*, for Barclay & Co. We hold debentures of the company and it is to our interest

(1) (1888) 39 Ch. D. 538.
(2) [1895] 1 Q. B. 276.
(3) (1790) 1 Ves. Jun. 139.
(4) (1845) 14 Sim. 600.
(5) [1895] 2 Ch. 1.
(6) (1804) 10 Ves. 110.

that all debts incurred by Watkins above the limit should be disallowed; so we support this application.

Upjohn, K.C., and *J. R. Atkin*, for the Collier Tyre Company, which had been appointed to represent such of the creditors of Watkins as manager as claimed in respect of goods sold and delivered to him, and damages for non-repair of motor cars sold by him under warranty. The decision in this case will be of very great importance. Many businesses are being carried on by receivers and managers, and if it is held that by an order of this kind a manager forfeits his right to indemnity all managers will know that in future everything they do will be inquired into with a view to depriving them of their indemnity. Nobody will undertake the office on such terms. We are subrogated to the rights of Watkins, and we submit that he has not lost his right to be indemnified for all the liabilities he has properly incurred in carrying on the business. We agree that it is settled law that a receiver and manager appointed by the Court has to carry on the business, and in doing so to enter into necessary contracts; that he is personally liable under those contracts; is entitled to be indemnified out of the assets against all liabilities necessarily and properly incurred; and that the indemnity is a first charge on the assets. Those are the terms of the contract on which Watkins was appointed, and the plaintiffs have to shew that that contract has been got rid of. He carried on the business as a principal in the same way as an executor carries on his testator's business: *In re Gorton.* (1) The orders of February 11, 1903, and July 19, 1904, were made on the footing that Watkins was entitled to an indemnity, and it is too late to dispute it. The order of August 27, 1902, which appointed him to be manager, was in general terms, and contained nothing about a limit. *Taylor* v. *Neate* (2) only shews that the contract with the manager can be altered by the insertion of express terms. There is no such term in any of these orders. The manager only has to shew that the liabilities were properly incurred: *Batten* v. *Wedgwood Coal and Iron Co.* (3) In *Strapp* v. *Bull, Sons & Co.* (4), the right to an indemnity was assumed. The

(1) (1889) 40 Ch. D. 536.
(2) 39 Ch. D. 538.
(3) (1884) 28 Ch. D. 317.
(4) [1895] 2 Ch. 1.

WARRINGTON J.
1906
BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED, *In re.*
HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

manager's right to indemnity is a contractual right arising out of the employment, and cannot be got rid of unless the contract is put an end to. A contract cannot be annulled by any conduct which does not amount to repudiation: *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) Watkins has not repudiated his contract in any way. During the whole of this period there was no day on which he could have been, without an application to the Court, prevented from carrying on the business. It cannot be said that in any sense he was acting wrongfully in doing so. Even if he has done wrong he has not lost his right to indemnity; the plaintiff's only remedy is in damages. It was not his duty to give information to anybody except to the Court; and it was not necessary for him to apply to the Court whenever it was necessary to borrow.

Cave, K.C., and *H. Lindon Riley*, for W. Denton, who had been appointed to represent creditors who claimed in respect of goods bargained and sold to Watkins, but not accepted by him or by the new manager. We support the same contention. Watkins had power to incur liabilities to an unlimited extent besides the 3000*l.* The orders say nothing to the contrary. The business had to be carried on so as to make a good show at an approaching exhibition of motor cars, and thus enable the business to be sold as a going concern. So Watkins was right in incurring these liabilities, and he is entitled to be indemnified: *Ex parte Izard* (2); *Batten* v. *Wedgwood Coal and Iron Co.* (3); *In re Glasdir Copper Mines, Ld.* (4)

Norton, K.C., in reply. We agree that Watkins is entitled to be indemnified for all liabilities which he has properly incurred; but we submit that he cannot say that it was proper without further leave to borrow beyond the limit imposed by the orders. He might have exceeded the limit and then applied to the Court to sanction what he had done, but he has not done so. He has acted improperly, and ought not to be allowed an indemnity: *Leedham* v. *Chawner* (5); *In re Dunn.* (6)

Cur. adv. vult.

(1) (1884) 9 App. Cas. 434.
(2) (1883) 23 Ch. D. 75.
(3) 28 Ch. D. 317.
(4) 22 Times L. R. 100; [1905] W. N. 172. (Since reported, [1906] 1 Ch. 365.)
(5) (1858) 4 K. & J. 458.
(6) [1904] 1 Ch. 648.

Feb. 6. WARRINGTON J. The applicants in this case ask for a declaration that the late manager appointed by the Court in the action (an ordinary debenture-holders' action) is not entitled to be indemnified out of the assets of the company in respect of certain debts and liabilities incurred by him in carrying on the business of the company. On the answer to this question it depends whether creditors of the manager in respect of such debts and liabilities are to be paid out of the assets of the company, the manager himself having become bankrupt. The summons asks, in the alternative, that the respective priorities of the debenture-holders and the several classes of creditors may be determined. [His Lordship stated the facts and proceeded:—]

The law as to the position of a manager appointed by the Court, where no special provision is made for meeting expenses and liabilities incurred by him, is not disputed, and is, indeed, beyond dispute. It is, on the one hand, his duty to carry on the business, and for that purpose to enter into proper contracts on his own responsibility, and it is, on the other hand, his right to be indemnified out of the assets against expenses and liabilities properly incurred in the execution of his duty: *Burt, Boulton & Hayward* v. *Bull* (1); *Strapp* v. *Bull, Sons & Co.* (2) Moreover, though I do not find this anywhere expressly laid down, I think that expenses and liabilities bona fide incurred in the ordinary course of the business would prima facie be treated as having been properly incurred. But is the position of the manager the same in cases where, as here, he is authorized to borrow a sum not exceeding a certain limit for the general purposes of the business he is carrying on? I say advisedly, "for the general purposes," for what I am about to say is not intended to apply to cases where the authority to borrow is for some special purpose. The effect of an authority to borrow for general purposes is to provide at the expense of the parties interested in the assets a special fund out of which the manager can indemnify himself, and the amount of that fund is fixed after considering what the parties interested state as to the requirements of the business. What is the result as to the manager's general right

(1) [1895] 1 Q. B. 276. (2) [1895] 2 Ch. 1.

WARRINGTON J.
1906
BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED, *In re.*
HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED.

to indemnity? That he is not deprived of it altogether follows, in my opinion, from the decisions in *Strapp* v. *Bull, Sons & Co.* (1) above referred to, and *In re Glasdir Copper Mines, Ld.* (2) On the other hand, when the Court thus protects the manager by providing a special indemnity, it cannot be that he is nevertheless entitled, without any further authority, to incur expenses and liabilities to an unlimited extent, and to require them to be met out of the assets.

It seems to me the true position in these cases is that the order is intended to limit his general authority, and, if he finds that the fund provided by the Court is not sufficient, it is his duty to cause the matter to be brought before the Court, so that, if it sees fit, it may increase it, or give him leave to incur further expenses or liabilities, which comes to the same thing. If, without such an application being made, he incurs expenses and liabilities exceeding the limit, he is, in my opinion, not entitled to be indemnified against them unless he can shew that, having regard to all the circumstances under which they were incurred, he was justified in incurring them without first obtaining leave. If he succeeds in shewing this, then I think the expenses and liabilities would be properly incurred, but not otherwise. What circumstances would justify the conduct of the manager in so increasing such expenses and liabilities without leave cannot, I think, be defined in general terms, but must be determined in each particular case. I will only say that, in my opinion, it would not be enough to shew that the expenses or liabilities were incurred bona fide and in the ordinary course of business.

As regards authorities, there is, in my opinion, none which throws any light upon the case. It is true that in *Strapp* v. *Bull, Sons & Co.* (1) and *In re Glasdir Copper Mines, Ld.* (2), managers with special powers to borrow were treated as entitled to an indemnity for expenses outside the limit; but in neither case was the present question raised; and I cannot but assume that the parties there did not desire to question the propriety of the manager's conduct in incurring such expenses. It was

(1) [1895] 2 Ch. 1. W. N. 172. (Since reported, [1906]
(2) 22 Times L. R. 100; [1905] 1 Ch. 365.)

argued that the rights and duties of the manager were fixed once for all by the original order. I cannot take this view. It seems to me that the Court can at any time limit the authority of its own officer.

The result is that it is still open to the manager, and through him to the claimants, to shew that his liabilities to the latter were properly incurred so as to entitle him to an indemnity, and them to payment through him. I was, indeed, asked to say that, under circumstances which were put in evidence, the manager in this particular case was entitled to no indemnity at all. I cannot come to this conclusion; and I think it better not to discuss the evidence, inasmuch as it will have to be gone into on the examination of the several claims before the registrar, and I am anxious not to prejudice questions the complete materials for deciding which may not be before me.

I propose to declare that Herbert Watkins, the late receiver and manager, is entitled to be indemnified against those debts and liabilities only (over and above the permitted overdraft of 3000*l.*) as to which he shall satisfy the judge that, having regard to all the circumstances under which the same respectively were incurred, he was justified in incurring them without first obtaining the leave of the judge. That part of the summons which refers to the priorities of the several classes of creditors had better stand over until the registrar has dealt with the several claims having regard to the above declaration.

Solicitors: *Jaques & Co., for Dickons & Aked, Halifax; Howe & Rake, for Lucas, Hutchinson & Meek, Darlington; Herbert Smith, Goss, King & Gregory; Tippetts, for Tippetts & Wall, Bootle.*

H. C. R.

WARRINGTON J.
1906
Feb. 7, 8.

LEWIS & SOLOME *v.* CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY COMPANY.

[1906 L. 101.]

Metropolis—Building—Party Wall—Railway Company—Building acquired by Agreement for Station Purposes outside Limits of Deviation—Demolition—Adjoining Owner—Interference with Party Structure—Party-wall Notice—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 45—*Charing Cross, Euston, and Hampstead Railway Act*, 1893 (56 & 57 *Vict. c. ccxiv.*), *s.* 31—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5, *sub-s.* 31, *and s.* 201; *Part VIII.*

By the Charing Cross, Euston, and Hampstead Railway Act, 1893 (56 & 57 Vict. c. ccxiv.), which incorporated the Lands Clauses Acts, the Companies Clauses Acts, and the Railways Clauses Consolidation Act, 1845, the company were authorized (s. 5) to make and maintain, in certain lines and according to certain levels, the railway and other works described in the Act, with all necessary and proper stations, works, and conveniences therewith. By s. 31 the company were empowered to take by agreement for the extraordinary purposes mentioned in the Railways Clauses Consolidation Act, 1845 (which included station purposes), any quantity of land not exceeding five acres; and it was provided that "any buildings erected on any land acquired under this section (except such buildings or parts of buildings as may be used for the purposes of a station) shall be subject to the provisions of the Acts relating to buildings in the metropolis." Under s. 31 of the Act the company acquired by agreement for the purposes of one of their stations a building which was situate outside their limits of deviation and not within their compulsory powers, and proceeded to pull it down without serving on the adjoining owner the party-structure notice required by the London Building Act, 1894:—

Held, that assuming that the party structure was affected by what the company had done, the company were not exempted by s. 31 of their Act from Part VIII. of the London Building Act, 1894, and were consequently bound to give to the owners of the adjoining premises the usual party-structure notice, and that in default of their so doing the remedy of the adjoining owners was by injunction and not compensation under the Lands Clauses Consolidation Act, 1845:

But *held*, upon the facts, that the company were not "building owners" within the meaning of s. 5, sub-s. 31, of the London Building Act, 1894, inasmuch as they had done nothing which in substance amounted to an interference with the party structure.

TRIAL OF ACTION.

The plaintiffs were the occupiers under a lease from the

Marquis of Salisbury of No. 22, Cranbourn Street, in the city of Westminster.

The defendant company were incorporated by the Charing Cross, Euston, and Hampstead Railway Act, 1893 (56 & 57 Vict. c. ccxiv.), which incorporated the Lands Clauses Acts, the Companies Clauses Acts, and the Railways Clauses Consolidation Act, 1845. By that Act and subsequent Acts the defendant company were authorized to construct a system of tube railways commencing under the Charing Cross Station yard of the South Eastern Railway Company, and running thence northwards beneath Charing Cross Road to Hampstead and Golders Green, with a branch from Camden Town to Highgate. Sect. 5 of the Act provided that: "Subject to the provisions of this Act, the company may make and maintain, in the lines and according to the levels shewn on the deposited plans and sections, the railways and other works hereinafter described, with all necessary and proper stations, platforms, approaches, passages, bridges, stairs, subways, tunnels, sidings, shafts, lifts, buildings, apparatus, generating plant, depôts, machinery, appliances, works and conveniences connected therewith, and may subject as aforesaid enter upon, take and use such of the lands delineated on the said plans and described in the deposited book of reference as may be required for those purposes. . . . ." Sect. 31 was as follows: "The company may take by agreement for the extraordinary purposes mentioned in the Railways Clauses Consolidation Act, 1845, any quantity of land not exceeding in the whole five acres, but nothing in this Act shall exonerate the company from any action, indictment or other proceeding for nuisance in the event of any nuisance being caused or permitted by them upon any land taken under the powers of this section: provided always that for the purposes of this section extraordinary purposes shall not without the consent of the council include the erection of buildings or works for generating electricity or the provision of yards, wharves and places for receiving, depositing and loading or unloading goods or cattle. Any buildings erected on any land acquired under this section (except such buildings or parts of buildings as may be used for the purposes of a station) shall be subject to the provisions of the Acts relating to buildings in the metropolis."

WARRINGTON J.

1906

LEWIS & SOLOME v. CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY.

At the intersection of Cranbourn Street and Charing Cross Road the defendant company were constructing a station for the purposes of which they had acquired a house, No. 21, Cranbourn Street. The house being situate outside the limits of deviation in their deposited plans, the defendant company were not able to take it under their compulsory powers, but had acquired it by agreement under s. 31 of their special Act. Having acquired the house the defendant company proceeded to pull it down, and in so doing the plaintiffs alleged that they had "affected" a party wall between that house and their premises, No. 22, and that they ought, therefore, before so doing to have given to the plaintiffs the party-structure notice required by the London Building Act, 1894, and that they had not done so.

On January 13, 1906, the plaintiffs issued their writ in the present action, claiming an injunction to restrain the defendant company from continuing the demolition of No. 21, Cranbourn Street in such a way as to interfere with the party wall between No. 21 and their adjoining premises, No. 22, and damages for wrongful interference with the plaintiffs' possession of No. 22.

On the same day the plaintiffs obtained an ex parte injunction restraining the defendant company, until after January 19 or until further order, from continuing the demolition as asked by their writ.

The action now came on to be heard without pleadings.

The preliminary point of law was first argued whether, assuming that what had been done by the defendant company had affected the party structure, the defendant company were justified in pulling down the premises acquired by them without first giving to the plaintiffs the usual party-structure notice required by the London Building Act, 1894.

Rowden, K.C., R. Cunningham Glen, and *P. B. Morle,* for the plaintiffs. Before pulling down their building the defendant company ought to have given the notice required by the London Building Act, 1894. The defendant company rely upon s. 31 of their special Act as exempting them from Part VIII. of the London Building Act, 1894. That section was inserted at the

instance of the London County Council in order to bring within the scope of the London Building Act certain structures of the railway company except buildings used for the purposes of a station. The effect of that exception was to leave station buildings in the same position in which they would be if s. 31 had never been passed, that is, subject to the existing exemptions only, which are from Parts VI. and VII., but not Part VIII., of the London Building Act.

But assuming that that section does not create a general exemption from the London Building Act, the defendant company, having acquired by agreement land which is outside the limits of deviation on their deposited plans, are in the position of ordinary owners. Land so acquired stands on a different footing from land specially authorized for a particular purpose and acquired under compulsory powers: *City of Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (1) By the special Act the defendant company were authorized to acquire land by agreement, but having so acquired it they take it as ordinary owners, and are subject to the provisions of the London Building Act: *London County Council* v. *London School Board.* (2)

Further, the defendant company were by their special Act empowered to acquire the land in question for an "extraordinary purpose." There is no inconsistency between that provision and the provisions of the London Building Act. To exclude a general Act it must be shewn that some inconsistency exists between its provisions and those of the special Act. The defendant company therefore, not being exempted from the London Building Act, are "building owners" within s. 5, sub-s. 31, of that Act (3), and have the rights given them by that Act and no other rights: *Standard Bank of British South*

(1) (1871) L. R. 2 H. L. Sc. 160.

(2) [1892] 2 Q. B. 606, 611.

(3) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) provides:—

Sect. 5: "In this Act, unless the context otherwise requires . . . . (31.) The expression 'building owner' means such one of the owners of adjoining land as is desirous of building, or such one of the owners of buildings storeys or rooms separated from one another by a party wall or party structure as does or is desirous of doing a work affecting that party wall or party structure."

WARRINGTON J.

1906

LEWIS & SOLOME v. CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY.

America v. *Stokes*. (1) *Major* v. *Park Lane Co*. (2) has no application to the present case, because the evidence here shews that the party structure has been affected. The plaintiffs are therefore entitled to the injunction they ask.

Roskill, K.C., and *Austen-Cartmell*, for the defendant company. Assuming that Part VIII. of the London Building Act does apply to the defendant company the compensation clauses of the Lands Clauses Acts are not, it is submitted, thereby excluded. Part VIII. contains a number of enabling sections for the benefit of the building owner. It enables him to go beyond his ordinary common law rights and to do certain things upon certain terms. The defendant company are entitled to say that they do not proceed under the London Building Act at all; that, although admittedly they are injuriously affecting the plaintiffs, the plaintiffs cannot compel them to serve a party-structure notice, because by the Lands Clauses Consolidation Act, 1845, the defendant company are given a statutory right to do so upon the terms of paying compensation as provided by s. 68 of that Act. The fact that the land in the present case was acquired by agreement and not compulsorily does not affect the position: *Kirby* v. *Harrogate School Board*. (3) The power of the defendant company to enter into an agreement is statutory. The special Act gives power to acquire land either compulsorily or by agreement, but the acquisition, whether by compulsion or by agreement, is only a means of working out the power of acquiring the land. The defendant company are entitled to pursue one of two alternative courses—they can either proceed under the London Building Act, 1894, in which case they would be bound to comply with its provisions as to serving notice, or they can proceed under the Lands Clauses Acts, in which case the plaintiffs would have their statutory right to compensation. The defendant company acquired No. 21 under s. 45 of the Railways Clauses Consolidation Act, 1845 (4), and

(1) (1878) 9 Ch. D. 68.

(2) (1866) L. R. 2 Eq. 453.

(3) [1896] 1 Ch. 437.

(4) The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), provides:—

Sect. 16: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purposes of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute

are under a statutory obligation to do certain works. By s. 16 of the same Act they are empowered to do all acts necessary for this purpose. This clearly includes the right to demolish the building they have acquired.

Then, as to s. 31 of the special Act. First, the section is a re-enactment and application of the provisions of s. 45 of the Railways Clauses Consolidation Act, 1845, to the defendant company, and limits the amount of land which they may take to five acres. Secondly, on the construction of the section, it is submitted that Parliament has enacted that lands acquired under it are to be divided under two heads—those which are to be used for station purposes and those which are not to be so used; and that as regards the latter the whole of the code of the London Building Act is to apply, and as regards the former the whole code is to be excluded. The defendant company rely on the words "except such buildings or parts of buildings as may be used for the purposes of a station." The meaning of those words is, it is submitted, this: That whenever the defendant company acquire a building by agreement under the section or under s. 45 of the Railways Clauses Consolidation Act, 1845, if it or any part of its site is to be used for the purposes of a station, it is to be exempt from the operation of Part VIII. of the London Building Act, whether or not it is also exempted from Parts VI. and VII. This exemption must also extend to the pulling down as well as the building up. All, therefore, that the defendant company have to do is to satisfy the Court that the land in question is to be

---

any of the following works; (that is to say,) . . . . They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway . . . ."

Sect. 45: ". . . . it shall be lawful for the company, in addition to the lands authorized to be compulsorily taken by them under the powers of this or the special Act, to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, not exceeding in the whole the prescribed number of acres for extraordinary purposes; (that is to say,) for the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing machines, toll houses, offices, warehouses, and other buildings and conveniences . . . ."

WARRINGTON J.

1906

LEWIS & SOLOME v. CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY.

used for station purposes only, in which case the plaintiffs' contention must fail.

R. Cunningham Glen, in reply.

[WARRINGTON J. I need not trouble you on the point arising on s. 31 of the special Act.]

The other point is whether, assuming that the defendant company have power under their special Act to demolish buildings, they can do so without complying with the requirements of the London Building Act. The power given them by s. 16 of the Railways Clauses Consolidation Act, 1845, to demolish buildings does not, it is submitted, involve this power. The defendant company, therefore, in demolishing their building, are bound to comply with the provisions of the London Building Act: *Uckfield Rural Council* v. *Crowborough District Water Co.* (1); *London County Council* v. *Wandsworth and Putney Gas Co.* (2) No doubt where works are necessary for the purpose of carrying out the statutory undertaking the powers given by the special Act are unaffected by any inconsistent provisions of a general Act: *City and South London Ry. Co.* v. *London County Council* (3); *London County Council* v. *London School Board.* (4) It is a question of fact to be decided in each case whether there is any necessary inconsistency between the provisions of the special and the general Act. It is quite possible that the defendant company could have demolished their building without touching or affecting the party wall, and if they had done so they would no doubt have been acting within their statutory powers. But if they went beyond that and did something which was unnecessary for them to do, they would then be in the position of ordinary owners. In such a case, having elected to go outside their powers, they would have done something which was ultra vires, and they would therefore be bound, like any ordinary owner, to give the necessary notice.

WARRINGTON J. The question of law which I have to determine is whether, assuming, as I do for the moment, that the defendant company, in pulling down No. 21, Cranbourn Street for the

(1) [1899] 2 Q. B. 664.
(2) (1900) 82 L. T. 562.
(3) [1891] 2 Q. B. 513.
(4) [1892] 2 Q. B. 606.

purposes of their railway undertaking, have done that which, under the London Building Act, 1894, a building owner would not be entitled to do without giving notice, they were justified in abstaining from giving that notice. [His Lordship stated the facts and referred to ss. 5 and 31 of the special Act, and ss. 16 and 45 of the Railways Clauses Consolidation Act, 1845, observing that, in his judgment, the purpose for which the land was acquired was an extraordinary purpose within s. 45 of the latter Act. He continued:—] Now, in the case of a tube railway, as this is, in the heart of London, it is, I think, clear that the pulling down of this house was one of the things which the defendant company might do under s. 16 of the Railways Clauses Consolidation Act, 1845. So far I agree with the contention of the defendant company.

The defendant company put their case in two ways. They say, first, that with regard to the erection of buildings to be used for station purposes they are altogether exempt from the requirements of the London Building Act, 1894. That Act is divided into parts, and contains a number of regulations referring to the erection, mode of construction, position, and so on, of buildings. Parts VI. and VII. relate particularly to the construction of buildings, and are headed respectively "Construction of Buildings" and "Special and Temporary Buildings and Wooden Structures"; Part VIII. relates to the "Rights of Building and adjoining Owners," and s. 201 exempts from the operation of Parts VI. and VII., but not from Part VIII. (inter alia): "Any building or structure situate upon the railway or within the railway or station premises, and used for the purposes of or in connection with the traffic of a railway company." It is said that there is a provision in s. 31 of the defendant company's special Act which, properly read, exempts the defendant company in respect of this house No. 21 from the provisions contained in Part VIII. of the London Building Act, 1894. I have read the first part of the section, which authorizes the defendant company to take for extraordinary purposes any quantity of land not exceeding in the whole five acres. Then there is a provision in reference to nuisance and a provision that for certain purposes the consent of the London County

WARRINGTON J.

1906

LEWIS & SOLOME v. CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY.

Council shall be required, and then come these words: "Any buildings erected on any land acquired under this section (except such buildings or parts of buildings as may be used for the purposes of a station) shall be subject to the provisions of the Acts relating to buildings in the metropolis." It is said that buildings erected on the land acquired as the site of No. 21 has been acquired are only made subject to the provisions of the London Building Act subject to this exception. That may be so, because the buildings erected for the purpose of the railway would, under s. 201 of the London Building Act, have been exempted from Parts VI. and VII. of that Act, and the effect of s. 31 seems to me to be to remove that exemption and to render the buildings used for the purposes of a railway, but not for the purposes of a station, subject to the provisions of the Act. In my judgment this section has no reference to the provisions as to adjoining owners in the London Building Act of 1894, but was intended to refer to buildings to be erected on land to be acquired by the company, and not to, what is a totally different matter, the interference by the defendant company with party structures. The whole tenor of that section shews that it was intended to exempt buildings used as stations from the provisions of the London Building Act, 1894, relating to buildings, and nothing more. It seems to me, therefore, there is nothing in s. 31 of the special Act to exempt the defendant company from the liabilities imposed by the London Building Act of 1894 in reference to party structures.

We then come to the London Building Act of 1894, and it is important to notice what is the nature of the enactment as to adjoining owners. That was explained by Sir George Jessel in *Standard Bank of British South America* v. *Stokes* (1), in which he was dealing with a provision of the Metropolitan Building Act, 1855, which was practically in identical terms with the Act of 1894, and it is really unnecessary for me to do more than state what, in my opinion, is the result of that decision. In my judgment the result of that decision is this, that, whatever at common law may be the rights of an adjoining owner in relation to a party structure, his rights in relation to a party structure within the area comprised by the Building Act depend upon that Act. He has the

(1) 9 Ch. D. 68.

rights which that Act gives him and no others. The argument on the part of the defendant company is this. They say: "We are entitled, by virtue of our special Act and the provisions of s. 16 of the Railways Clauses Consolidation Act, 1845, to demolish this building, and if, in the course of demolishing it, we interfere with the party structure, we do, in reference to the party structure, that which, if we were ordinary owners, we could not do without giving the requisite notice; that, in our case, does not matter. We are authorized to do it by our special Act, and the right, if any, of the adjoining owner is to compensation, and not to an injunction." In my judgment the fallacy of that argument lies in this. I will assume that the special Act authorized the defendant company to demolish the building. It does not, however, say anything about interfering with or affecting a party structure, and it does not necessarily follow that in demolishing a building they would demolish or affect the party structure. In fact, it is said in the present case by the defendant company that they have not done so. It seems to me, therefore, that their statutory enactments cannot be read so as to authorize them to deal with a house on land which they acquire in such a manner as to affect the party structure without giving the necessary notice. For the reasons which I have already given I think that s. 31 does not exempt them, and for the reasons which I am now giving I think they are to be treated for the purposes of the London Building Act, 1894, as ordinary owners of land, who in the course of dealing with it may be, to follow the words of s. 5, sub-s. 31, of the Act, persons who are "desirous of doing a work affecting" a party wall or party structure. If, in doing the work, the defendant company are parties so desirous of doing a work affecting the party wall or party structure, they must, it seems to me, like any other adjoining owner, give the notice required by the Act.

There is one other point which, in the view I take, is unnecessary to consider. It is said that even if in the case of land taken by compulsion the defendant company would have been protected, they will not be protected in the case of land taken by agreement. In my opinion the views which I have expressed would apply equally to land taken compulsorily as to land taken by agreement, and therefore I need not deal with that point.

WARRINGTON J.
1906
LEWIS & SOLOME v. CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY.

The action was then heard on the merits, and, after hearing the evidence and viewing the premises, his Lordship found as a fact that the defendant company were not "building owners" within the meaning of s. 5, sub-s. 31, of the London Building Act, 1894, inasmuch as what they had done was not in substance an interference with the party structure. He accordingly dismissed the action, but, having regard to the position taken up by the defendant company in the correspondence, without costs.

Solicitors: *G. C. L. Fry; Bircham & Co.*

W. I. C.

WARRINGTON J.
1906
Feb. 8.

HASKELL GOLF BALL COMPANY *v.* HUTCHISON AND MAIN.

[1904 H. 4175.]

Practice — Costs — Taxation — Action for Infringement of Patent — Defences of Non-infringement and Invalidity — Separate Issues — Dismissal of Action with Costs—Costs of separate Issues—Particulars of Objections—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-s.* 6—*Rules of Supreme Court*, 1883, *Order* LXV., *r.* 2.

In an action for infringement of a patent the defendants denied infringement, and alleged want of subject-matter and of novelty by reason of a large number of alleged anticipations. At the trial the judge dismissed the action with costs on the ground of want of novelty in respect of two anticipations only:—

Held, that the taxing master, in taxing the costs, must not disallow costs incurred with respect to issues on which the judge found that the defendants had failed, or tax the costs as if the action had been confined to proving the two objections on which the defendants succeeded, but must tax the whole of the defendants' costs, disallowing only the costs of those objections in respect of which no certificate was given pursuant to s. 29, sub-s. 6, of the Patents, Designs, and Trade Marks Act, 1883.

SUMMONS to review taxation.

The action was brought for an injunction to restrain the defendants from infringing the plaintiff company's patent.

The defendants by their defence denied the infringement, and alleged that the patent was invalid for the reasons stated in their particulars of objections.

In their particulars of objections they alleged want of novelty,

and enumerated a large number of instances of alleged prior publications (inter alia), No. 1 B (10.) in the case of George Fernie, and No. 1 B (15.) in the case of Captain Duncan Stewart. They also alleged that the patent was invalid by reason of the insufficiency of the specification and for want of subject-matter.

On May 29, 1905, the action came on for trial before Buckley J., who on June 28 dismissed the action with costs. (1) By the order as drawn up it was ordered that the action should stand dismissed, and that the defendants' costs of the action on the higher scale should be taxed by the taxing master; and it was also certified, pursuant to s. 29 of the Patents, Designs, and Trade Marks Act, 1883, that the particulars of objections delivered by the defendants, Nos. 1 B (10.) and 1 B (15.), in the particulars of objections mentioned were reasonable and proper.

The defendants carried in their bill of costs, amounting to 4283*l.* 17*s.* 7*d.*, for taxation, which was taxed by the taxing master at 796*l.* 13*s.* 11*d.*

In their objections to taxation the defendants objected (inter alia) that as regarded their particulars of objections the taxing master had only given them the costs of the items for which a certificate had been granted, and had allowed them only such costs as would have been incurred in an action in which the sole issue was the question of prior publication of the plaintiff company's invention by George Fernie and Captain Stewart.

In his answers to the defendants' objections the taxing master stated that he had taxed the costs on the footing that there were more issues than one of prior publication; and he held that the defendants were entitled to the general costs of the action, but found the amount to be a comparatively small one, having regard to the fact that the defendants had not recovered on the two important defences set up in the defence, viz., non-infringement and invalidity, for the reasons set out in their particulars of objections. He further stated: "I have read the judgment, and I think it is clear that the judge considered that the defendants did infringe, but there was practically no contest at all under this head. It was urged before me on behalf of the defendants that the evidence of Professor Boys and others did

(1) 22 Rep. Pat. Cas. 478.

WARRINGTON J.
1906
HASKELL GOLF BALL COMPANY v. HUTCHISON AND MAIN.

not deal with matters contained in the particulars of objections, but related to infringement. I do not think, as I have already stated, that the defendants succeeded on this issue of infringement. In my opinion the evidence of Professor Boys and other witnesses of that class dealt with the matters mentioned in the third head of the particulars of objections, and in respect of which no certificate has been given."

The defendants took out the present summons, asking that their objections might be allowed, and that it might be referred back to the taxing master to vary his certificate accordingly.

Bousfield, K.C., and *J. C. Graham*, for the defendants. The formal order of June 28, 1905, was free from ambiguity, and it was the duty of the taxing master to obey it. He was not entitled to look at the oral judgment of the judge who decided the case. But assuming that he was so entitled, it was not competent to him to read into the formal order a direction that the defendants were to be disallowed the costs of issues upon which, in his opinion, they had failed. The defendants were entitled to put their whole case before the Court, and it was for the Court to disallow the costs of any issues which, in its opinion, the defendants had improperly raised. The general rule is that, in the absence of any special direction in the order, the general costs of the action will, in the case of a successful defendant, carry with them the costs of minor points on which he may have failed: *Jenkins* v. *Jackson*. (1)

Norton, K.C., and *A. J. Walter*, for the plaintiff company. The taxing master has proceeded on a right principle. The defendants by their defence raised several distinct issues. On the issue of non-infringement they failed, and they are not, therefore, entitled to the costs of that issue: *Phillips* v. *Ivel Cycle Co.* (2) They ought to have pleaded that they had infringed, but that the patent was invalid. At the trial Buckley J. expressed an opinion that the defendants had infringed, but held that the patent was invalid by reason of the prior anticipating by Fernie and Stewart.

By the Rules of the Supreme Court, Order LXV., r. 2: "When

(1) [1891] 1 Ch. 89, 97. (2) (1890) 62 L. T. 392.

issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event."

[WARRINGTON J. That rule appears to be confined to claims and counter-claims.]

There cannot be an issue raised on one document alone.

[WARRINGTON J. It is the second part of the rule which enables the judge to deal with defences.]

The issue of the validity of a patent is raised on the claim. The proper way of taxing the costs in an action like the present is, as pointed out by Brett M.R. in *Jones* v. *Curling* (1), to tax the costs of the separate issues. Here there were two issues: (1.) infringement and (2.) invalidity, and the defendants having failed on the first issue ought not to be allowed the costs of it.

Bousfield, K.C., in reply.

WARRINGTON J. stated the facts and continued:—Sect. 29, sub-s. 6, of the Patent Act of 1883 provides that: "On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the Court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case." What these last words mean I do not know, and no meaning has been suggested, but I do not think it matters.

Now, what is the effect of that enactment where, as in this case, the judge gives the defendants their costs of the action? It seems to me that the taxing master's duty is to tax the costs just as he would tax the costs of any other action, except that he must not allow costs in respect of those particulars as to which no certificate has been given. His duty in respect to the disallowance of costs is limited to that.

What the taxing master has done here is this. He has taken into consideration not merely the formal judgment which directs him to tax the costs, but also the reasons given by the learned judge who tried the case in his oral judgment; and, although

(1) (1884) 13 Q. B. D. 262.

WARRINGTON J.
1906
HASKELL GOLF BALL COMPANY v. HUTCHISON AND MAIN.

the learned judge gave no directions to him to disallow the defendants the costs of the issue whether assuming the patent to be valid they had infringed it or not, he has disallowed them the costs of that part of their case, and that seems to me to be wrong.

It is said that he was justified in so doing by Order LXV., r. 2, which is in these terms: "When issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event."

In my judgment that rule has no application to a case like the present. It is confined to issues in fact and law raised upon a claim or counter-claim, and in that case the costs are to follow the event. In my opinion the direction that the costs are to follow the event means this: that where a plaintiff by his claim raises distinct causes of action in respect of which the events may be on one side or the other—perhaps one way on one cause and another way on another cause—then the costs are to follow the respective events. This is illustrated by *Jones* v. *Curling*. (1) There the action was for the recovery of several separate closes of land. In such a case there is a separate cause of action in respect of each separate close. The defendant there defended as to each close, and the jury found that the plaintiff was right as to some closes but wrong as to others, and the Court of Appeal held that the case came within Order LXV., r. 1. That was no doubt so, and there can be really no difficulty about a case like that. But what is here suggested is that where in an action for infringement of a patent, which is all I have to deal with here, the defendant defends on two grounds—namely, invalidity and non-infringement—separate issues in fact are raised upon the claim. That seems to me to be wrong. The claim raises one issue, and one issue only—namely, whether the defendant has infringed the plaintiff's legal right. The cause of action is the infringement of the plaintiff's legal right. I think, therefore, that the taxing master was wrong in taking the course he did in looking, not at the formal judgment, but at the reasons given by the learned judge in his oral judgment, and finding upon those reasons that the learned judge

(1) 13 Q. B. D. 262.

had held that the defendants had failed in the issue of non-infringement, and then depriving them of the costs of that issue. In that respect the taxing master, in my judgment, went beyond his duty, and the matter must be referred back to him.

WARRINGTON J.
1906
HASKELL GOLF BALL COMPANY v. HUTCHISON AND MAIN.

[His Lordship then dealt with the defendants' other objections to taxation, and referred the matter back to the taxing master to allow the costs of the action, except those incurred in respect of the particulars of objections for which no certificate had been given.]

Solicitors: *Burton, Yeates & Hart; Wilson, Bristows & Carpmael.*

W. I. C.

In re CRIGGLESTONE COAL COMPANY. STEWART *v.* CRIGGLESTONE COAL COMPANY.

[1906 C. 108.]

SWINFEN EADY J.
1906
Jan. 20.

Practice—Company—Debenture-holders' Action—Property in Jeopardy—Motion for Judgment on Admissions in Pleadings—Immediate Sale—Form of Order—Rules of Supreme Court, Order LI., *r.* 1 B.

In a debenture-holders' action, when the property comprised in debentures is in jeopardy, an immediate sale will be ordered under the Rules of the Supreme Court, Order LI., r. 1 B, on motion for judgment on admissions in the pleadings, but, unless all the debenture-holders subsequent to the plaintiffs are parties to the action, the order will be for sale with the approbation of the judge, so that the absent debenture-holders may be brought in in chambers on the application to approve the conditional contract for sale.

THE Crigglestone Coal Company had issued three series of debentures, the first for 25,000*l.* secured by a trust deed, the second for 20,000*l.*, and the third for 40,000*l.* This action was brought by the trustees of the deed, and the holder of 600*l.* of the first series of debentures on behalf of himself and all other the holders of such debentures, to realize their security. The defendants were the company; C. A. Moulton, who held all the second series of debentures; and E. A. Brotherton, who held 19,000*l.* out of the 40,000*l.* third debentures. One of the trustees held 3000*l.* of the third debentures. The holders of the residue of the third debentures were not parties, and had not been served with any notice of the proceedings.

SWINFEN EADY J.
1906
CRIGGLESTONE COAL COMPANY, *In re.*
STEWART *v.* CRIGGLESTONE COAL COMPANY.

The principal of the first debentures was not payable until January 1, 1910, and no interest was in arrear. The company had recently been in difficulties owing to a serious fault in their colliery behind which there was a considerable feeder of water. When the company had worked through the fault the water flowed into the colliery. The company had for some time spent large sums of money in pumping and in trying to get over the difficulties, and consequently had been working at a loss. On January 8, 1906, the directors passed a resolution "that the company shall forthwith cease to carry on business, and the managing directors shall clean off all faces and leave the workings in good condition with a view to realization, and maintain the pumping, ventilation and machinery of the colliery." The writ in this action was issued on January 9; a receiver was appointed on the same day, and he went into possession on January 10. The statement of claim alleged the above facts, and that there were arrears of rent amounting to 3000*l.* due to the landlord; that it would require from 10,000*l.* to 15,000*l.* to put the mine in working order; that the debenture-holders were not in a position to find capital; that it was necessary to pump daily to prevent the destruction of the mine, and the receiver had in his hands for that purpose only such moneys as he from time to time received for debts due to the company—a precarious source of income, which might fail at any time—and he might any day be unable to continue pumping.

All the defendants put in defences admitting the facts alleged in the statement of claim. The plaintiffs now moved for judgment on the admissions in the pleadings. The proposed minutes contained a declaration that the plaintiffs were entitled to a charge, directions for the usual accounts and inquiries, and an order that the receiver should be at liberty to sell by public auction or private contract all the property and assets of the company as a going concern. An affidavit by the receiver had been filed verifying the allegation in the statement of claim.

Hon. E. C. Macnaghten, K.C., and Humphry, for the plaintiffs. It is absolutely necessary, in the interests of all parties, that the property should be sold, and we ask for an immediate sale under

Order LI., r. 1 B. (1) In *In re Day and Night Advertising Co.* (2) Cozens-Hardy J. made the order, but required the facts to be proved by affidavit as we have done.

[SWINFEN EADY J. How can I make a declaration that the plaintiffs have a charge in the absence of some of the third debenture-holders?]

We have 22,000*l.* out of the 40,000*l.* here, and the sale is so obviously necessary that no objection is likely to be made. This seems to be the very case to which the rule was intended to apply.

Manson, for the company, and *Baden Fuller*, for the other defendants, consented to the proposed order.

SWINFEN EADY J. I have felt a difficulty in making the order in the form proposed, because under Order LI., r. 1 B, it must be shewn that the plaintiffs are entitled to a charge before there is jurisdiction to make an order for a sale, and some of the third debenture-holders, whose interest it would be to dispute the plaintiffs' charge, are not parties to the action. I will, however, direct that the property shall be sold with the approbation of the judge and the proceeds brought into Court. Then the absent debenture-holders can be served with notice of the application in chambers for approval of any conditional contract. There must be a declaration of charge, but the direction that the receiver shall sell must be struck out of the minutes and an order for sale with the approbation of the judge substituted for it. The rest of the order will be in the usual form.

Solicitors: *Gribble, Oddie, Sinclair & Johnson, agents for Stewart & Chalker, Wakefield.*

(1) "In debenture-holders' actions, where the debenture-holders are entitled to a charge by virtue of the debentures, or of a trust deed, or otherwise, and the plaintiff is suing on behalf of himself and other debenture-holders, and where the judge in person is of opinion that there must eventually be a sale, he may in his discretion direct a sale before judgment, and also after judgment, before all the persons interested are ascertained, whether served or not."

(2) (1900) 48 W. R. 362.

J. R. B.

SWINFEN EADY J.

1906

Feb. 2.

In re PARKER'S POLICIES.

[1906 P. 56.]

Husband and Wife—Policy of Assurance—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy for Benefit of Widow or Children —Death of Wife—Second Marriage of Assured.*

A man, having a wife living, effected two policies on his life, in accordance with the provisions of s. 10 of the Married Women's Property Act, 1870. The policy moneys were expressly made payable to his widow and children, or some or one of them, as he should by deed or will appoint. His wife died, he married again, and by deed appointed the policy moneys to his second wife if she should survive him and become his widow. He died leaving his second wife and children of both marriages surviving :—

Held, that an after-taken wife is within the Act of 1870, and the widow was entitled to the moneys. For this purpose there is no difference between s. 10 of the Married Women's Property Act, 1870, and s. 11 of the Act of 1882.

In re Browne's Policy, [1903] 1 Ch. 188, followed.

Held, also, on the construction of the policies, that if the second wife were outside the Act she would still have been entitled by virtue of the contract with the insurance company.

On May 6, 1879, Robert William Parker effected two policies of assurance on his own life for 1000*l.* each with the Scottish Provident Institution. Both policies were in the same form: they recited that R. W. Parker was desirous of insuring his life in accordance with the provisions of s. 10 of the Married Women's Property Act, 1870, and after other recitals continued :—

" Now these presents are to certify that in consideration of the premises, the said R. W. Parker has been duly admitted a member, and that, under the provisions of the said Married Women's Property Act, his widow or widow and children, or some or one of them, in such shares and proportions and interest and generally in such manner as the said R. W. Parker shall by any will or codicil thereto or by deed revocable or otherwise appoint, shall be entitled to receive out of the funds of the said institution at the end of six months after the decease of the said R. W. Parker the sum of 1000*l.*"

At the date of the policies Emma Parker, the first wife of R. W. Parker, was living; she died on July 6, 1881, leaving three children of the marriage, one son and two daughters.

On October 4, 1886, R. W. Parker married his second wife, Louisa Agnes Mew.

On April 28, 1903, R. W. Parker by deed poll appointed that all moneys payable under the policies "shall go and belong to my dear wife Louisa Agnes Parker if she shall survive me and become my widow for her own use and benefit absolutely, but if and in case my said dear wife shall not survive me and become my widow, then I declare and appoint that the said two several sums of 1000*l.* shall go and belong to the daughters of me who shall survive me in equal shares."

R. W. Parker died on November 25, 1903, leaving him surviving his widow Louisa Agnes Parker, the three children of his first marriage, and one child, a daughter of his second marriage. This summons was taken out by the widow for the determination of the question who were entitled to the policy moneys. The question turned on the construction of the Married Women's Property Act, 1870, s. 10 (1), and of the policies.

Reginald Hughes, for the widow. There is nothing in s. 10 of the Married Women's Property Act, 1870, to confine the word "wife" to a wife living at the date of the policy, and, unless it is so confined, the policy is within the Act and the appointment to the second wife is good. If, on the other hand, the second wife is not within the words of the Act, then the policy was outside the Act, but it is perfectly good as a voluntary settlement of a reversionary interest. Therefore the widow takes in either case.

Hon. Frank Russell, for the three children of the first wife. Sect. 10 of the Act of 1870 is confined to an existing wife. The appointment to the second wife is bad, and as the power of

(1) "A policy of insurance effected by any married man on his own life, and expressed upon the face of to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate . . . ."

SWINFEN EADY J.

1906

PARKER'S POLICIES, *In re.*

appointment to children did not arise, the children take in default of appointment.

In *In re Browne's Policy* (1) Kekewich J. held that s. 11 of the Married Women's Property Act, 1882, included a future wife. But in that Act the words are "a policy effected by any man." In this Act the words are "by any married man," and therefore the policy is of the nature of a post-nuptial settlement in which the word "wife" is always taken to include only an existing wife.

In re Griffiths' Policy (2) was a case under the Act of 1870, and Joyce J. held that the second wife was excluded, but his decision turned upon the construction of the policy.

In re Hancock (3) was not the case of a policy, but all the three Lords Justices state the rule, in cases of post-nuptial settlement, to be that the word "wife" refers only to an existing wife, and the rule is admitted by Kekewich J. and Joyce J. in the cases above cited. The policies are expressly stated to be made according to the provisions of the Act. They must be read with the Act for the purposes of construction, and if so read the words "his widow" must be read as meaning "his present wife if she becomes his widow." If the second wife is not within the Act she is not within the power. I admit the child of the second marriage must share with the children of the first.

Reginald Hughes, in reply. In *In re Hancock* (3) the dicta of all the judges are founded on the fact that the power of appointment was in favour of the man's wife, not of his widow. This case is covered by *In re Browne's Policy*. (1)

SWINFEN EADY J. The question I have to decide is, who is entitled to the moneys secured by two policies on the life of Robert William Parker, a solicitor, effected with the Scottish Provident Institution on May 6, 1879. [His Lordship stated the facts of the case as above, and continued:—] The only parties to the summons are the widow and the three children by the first marriage, and the summons was taken out on the footing that the contest was between the widow and those three children; but

(1) [1903] 1 Ch. 188. (2) [1903] 1 Ch. 739.
(3) [1896] 2 Ch. 173.

in the course of the argument it was conceded that a child which had been born of the second marriage was in the same position as those of the first marriage, so that if the children were to take the fund the four would take, and not the three only. The question really is whether the widow takes the fund as appointed, or whether the children take it as unappointed. It is argued that the widow, who was the second wife of Parker, is not within the trust created by the Married Women's Property Act, 1870 —which was in force when the policies were effected, and which, by s. 10, enables any married man to effect a policy on his own life, expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them. That, it is said, means his wife at the date of the policy. On the other hand, it is contended that the word "wife" is not limited to the wife at the date of the policy, but would include an after-taken wife. In *In re Browne's Policy* (1), Kekewich J. decided that a second wife was within the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 11), and although there are slight differences between s. 10 of the Act of 1870 and s. 11 of the Act of 1882, on examining the two sections carefully I am unable to draw any distinction between them on this point. If a second wife is within the later Act she is also within the earlier. Assuming that a second wife is within the statute, the appointment is valid. The trusts of the policies are for "the widow or widow and children or some or one of them in such shares, proportions, and interest and generally in such manner as the said Robert William Parker shall by any will or codicil thereto or by deed revocable or otherwise appoint," and Parker during his life exercised the power by appointing to his second wife, who became his widow. If the second wife is not within the terms of the Act, what is the alternative? The only alternative is that the settlor has introduced into the policies a stranger—a person who is not a wife within the meaning of the Act—and has attempted to make provision for that stranger. That is not authorized by the Act. The Act of 1870 contains certain provisions enabling the policy moneys to be secured for the benefit of certain persons of a limited class, and the policy is to be "deemed a trust for the

(1) [1903] 1 Ch. 188.

SWINFEN EADY J.

1906

PARKER'S POLICIES, *In re.*

benefit of" those persons "and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate"—that is, certain special statutory privileges are attached to a policy effected in accordance with the Act; but as soon as you introduce as an object of the trust a person not a member of the limited class, then the policy is not within the Act. Mr. Russell urged that, reading the policies and the Act together, I must read the word "widow" in the policies as meaning "my present wife if she survives and becomes my widow"; but it is impossible so to restrict the language. The persons mentioned in the policies are the widow and children. It is conceded that children by a future wife are included, and yet the argument would restrict the benefits to the present wife if she becomes the widow, and at the same time admit to them the children of a future wife. In my judgment "widow" means the person who at the death of the husband shall become the widow. On the assumption that the policy is not within the statute, it is simply an agreement between the husband and the institution that on his death the money shall be paid to the objects of the power as the assured shall by deed appoint, and the assured has appointed to the plaintiff. So, whether the plaintiff is or is not within the statute, she takes by appointment, and I so decide. I have not referred to the case of *In re Griffiths' Policy* (1), which was cited, because that was a decision on the construction of the particular policy and not on the statute.

Solicitors: *Hughes & Masterman.*

(1) [1903] 1 Ch. 739.

J. R. B.

SWINFEN EADY J.

1906

Feb. 6.

In re VALPY.
VALPY *v.* VALPY.

[1905 V. 1014.]

Will—Exoneration—Contrary Intention—Direction to pay Debts, "except Mortgage on Blackacre"—Other Mortgages—Locke King's Acts—Real Estate Charges Act, 1867 (30 & 31 *Vict. c.* 69), *s.* 1.

A direction to pay debts, "except mortgage debts, if any, on Blackacre," out of residue, implies that other mortgage debts are to be paid out of residue, and is a sufficient contrary intention within the Real Estate Charges Act, 1867, s. 1, to take the case out of the Real Estate Charges Acts (Locke King's Acts).

ORIGINATING SUMMONS.

By clause 9 of his will, dated November 29, 1894, a testator devised Blackacre to specific devisees.

By clause 14 he devised and bequeathed Whiteacre, and all other his real and personal estate not thereby or by any codicil otherwise disposed of, to his trustees upon trust for sale and conversion.

By clause 15 the testator directed that the trustees should, out of the money to arise from the sale and conversion of his said real and personal estate under the trust lastly thereinbefore contained and out of his ready money, pay his funeral and testamentary expenses and debts, "except charges and mortgage debts, if any, on property specifically devised, which debts are to be paid primarily out of the property charged therewith," and should also pay or provide for the legacies and annuities thereby or by any codicil bequeathed and all death duties in respect of his estate or in respect of the devises and bequests in his will or any codicil contained, which devises and bequests should be taken by the devisees and legatees free of duty, and should divide, pay and transfer the residue of the said money, and he bequeathed the same in manner following—that was to say, such part thereof as consisted of the proceeds of sale of his residuary estate other than Whiteacre unto four named children and a grandson in equal shares, and such part of the said money as consisted of the

SWINFEN EADY J.
1906
VALPY, *In re.* VALPY v. VALPY.

proceeds of sale of Whiteacre unto the four named children in equal shares. One of the named children was also an executor and trustee of the will.

The testator died on December 18, 1904.

The only mortgage or charge on the testator's estate at the time of his will and his death was a mortgage on Whiteacre dated March 25, 1868.

At the time of his will and his death the testator had no real property other than Blackacre and Whiteacre.

This summons was issued to determine (inter alia) whether the mortgage was to be borne by Whiteacre alone or whether it was to be borne rateably by Whiteacre and the general residue.

J. M. Paterson, for the executors and trustees.

Crossfield, for the children interested in Whiteacre other than the trustee. Whiteacre is not specifically devised within the meaning of clause 15. The only specific devise is that of Blackacre in clause 9. The testator has therefore directed his debts, except the mortgage debts, if any, on Blackacre, to be paid out of the mixed residuary fund. This is a sufficient contrary intention within the Real Estate Charges Act, 1867, s. 1, and the mortgage on Whiteacre must therefore be paid out of that fund.

Tomlin, for the grandson. Whiteacre is specifically devised within the meaning of clause 15. In any case there is no contrary intention within the Real Estate Charges Act, 1867, s. 1: *Nelson* v. *Page* (1); *Elliott* v. *Dearsley* (2); Carson's Real Property Statutes, p. 433. The mortgage debt must therefore be paid out of Whiteacre.

SWINFEN EADY J., after holding, on the construction of the will, that Whiteacre was not specifically devised within the meaning of clause 15, continued:—The true construction of clause 15 is therefore tantamount to a direction to pay the testator's debts, "except charges and mortgage debts, if any, on Blackacre," out of the mixed residuary fund. Is that a contrary intention within the Real Estate Charges Act, 1867, s. 1? In my opinion it is. The section provides that in the construction of the will

(1) (1868) L. R. 7 Eq. 25, 28. (2) (1880) 16 Ch. D. 322.

of any person who may die after December 31, 1867, a general direction that the testator's debts shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to the rule established by the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), unless such contrary intention shall be further declared by words "expressly or by necessary implication" referring to "all or some" of the testator's debts or debt charged by way of mortgage "on any part" of his real estate. Now, this will refers to the mortgage debts, if any, on Blackacre, and directs all other debts to be paid out of the mixed residuary fund. That is a clear implication that the mortgage debts other than those, if any, on Blackacre are included in the general direction to pay the debts. There is therefore a contrary intention within the Real Estate Charges Act, 1867, and the mortgage on Whiteacre must be borne rateably by the mixed residuary fund.

Solicitors: *Valpy, Peckham & Chaplin*; *Dimond & Son.*

G. R. A.

SWINFEN EADY J.

1906

Jan. 16, 20, 30; *Feb.* 8.

In re LONDON UNITED TRAMWAYS ACT, 1900.

Lands Clauses Acts—Sale of Copyholds—Death of Vendor before Completion—Fine on Heir's Admission—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 82.

A vendor, as trustee of a will, agreed to sell copyholds to a public tramway company, the company agreeing to pay "the vendor's costs of title and conveyance as provided by the Lands Clauses Act, 1845." The vendor died before completion, and his customary heir was admitted in order that he might convey under s. 95:—

Held, that the fine and fees payable on this admission must be borne by the company under s. 82.

In re Liverpool Improvement Act, (1868) L. R. 5 Eq. 282; *Ex parte Keatley*, (1890) 25 L. R. Ir. 265; *In re Lloyd and North London Railway (City Branch) Act*, 1861, [1896] 2 Ch. 397; and *In re Bear Island Defence Works and Doyle*, [1903] 1 I. R. 164, applied.

SUMMONS to review taxation.

By an agreement dated February 16, 1903, and made between Charles Kernot Butt, thereinafter called the vendor, of the one part, and the London United Tramways (1901), Limited, thereinafter called the company, of the other part, by virtue of the powers and subject to the provisions of the London United Tramways Act, 1900 (63 & 64 Vict. c. cclxxi.), which incorporated the Lands Clauses Acts, the vendor, as trustee of the will of William Babb, agreed to sell and the company to purchase for 675*l.* the inheritance, according to the custom of the manor of Hampton Court, of certain copyhold lands, subject to all quit and other rents, incidents of tenure and easements affecting the same. The 675*l.* was to include compensation for all damage, loss or inconvenience occasioned by severing the land purchased from other lands of the vendor, or by injuriously affecting the vendor by the construction of the authorized tramway and works, or which he should sustain by reason of the exercise as regards those lands, of the powers of the said Act or the Acts incorporated therewith.

The vendor and all other necessary parties were to execute all proper conveyances to the company. The purchase was to be

completed and the purchase-money paid on April 4, 1903, on which day the company were to be entitled to possession, but if the purchase was not completed and the purchase-money paid on that day, the company were to pay 5 per cent. interest thereon from that day to the day of payment. The rent and outgoings (if any) were to be apportioned between the vendor and the company up to April 4, 1903, and paid or allowed on completion. The company were to be at liberty to take possession at any time after April 4, 1903, and in that case they were to pay the vendor 5 per cent. interest on the purchase-money from the time of taking possession until payment thereof. Before taking possession the company were to deposit the purchase-money at Parr's Bank in the joint names of the vendor and their secretary, such taking of possession to be considered as without prejudice to any question on the title or otherwise. The company were to pay "the vendor's costs of title and conveyance, as provided by the Lands Clauses Act, 1845."

The company in fact deposited the purchase-money, and took possession by arrangement on February 27, 1903.

On October 27, 1903, the vendor, the tenant on the rolls, died, before completion.

On December 20, 1904, the vendor's customary heir, who had no beneficial interest, was admitted in order that he might convey to the company under s. 95 of the Lands Clauses Consolidation Act, 1845, and a fine of 250*l.* and fees amounting to 5*l.* 16*s.* 6*d.* were paid by the vendor's executors. The lord had made two proclamations before the admittance.

On June 2, 1905, the purchase was completed without prejudice to the question how the 255*l.* 16*s.* 6*d.* was to be borne.

The solicitor to the executors included the amount in his bill of costs, and on the company refusing to pay it, the executors on June 22, 1905, obtained an order for taxation under s. 83 of the Lands Clauses Consolidation Act, 1845. The master allowed the bill in full, and, in answer to the company's objection to the allowance of the 255*l.* 16*s.* 6*d.*, said: "In my opinion the promoters are legally liable to pay the costs of obtaining the admittance. I think the facts of the case are within the principle laid down in the cases of *In*

SWINFEN EADY J.

1906

LONDON UNITED TRAMWAYS ACT, 1900, *In re.*

re Liverpool Improvement Act (1) and *Ex parte Lurgan Urban Council.*" (2)

The company took out this summons to review.

Christopher James, for the company. This is the case of an agreement following a notice to treat. In an ordinary case of vendor and purchaser the purchaser would not be liable for the fine or fees: *Paramore* v. *Greenslade* (3); *Barrow* v. *Barrow*. (4) The only question is whether the expense is thrown on the company by the Lands Clauses Consolidation Act, 1845, s. 82. (5) That section includes the costs of taking out administration in order to constitute a person to convey: *In re Liverpool Improvement Act* (1), followed in *Ex parte Keatley*. (6) In the former case no probate duty was paid, and it does not appear that any was paid in the latter case. The costs of taking out administration do not strictly include probate or estate duty: *In re Kingdon and Wilson*. (7) *Ex parte Lurgan Urban Council* (2), in which estate duty was allowed, was only a decision on s. 80. In the present case the fine and fees would have become payable quite apart from the purchase, so that they ought not to be treated as costs of conveyance.

Even if the section includes all the costs of constituting a proper person to convey, it does not include the fine. It was perhaps necessary to pay the fees before admittance, but it was quite unnecessary to pay the fine. The lord would have been bound to admit, and the admittance would have been complete without that payment: *Graham* v. *Sime* (8); *Barrow* v. *Barrow* (4); Scriven

(1) L. R. 5 Eq. 282.
(2) [1902] 1 I. R. 157.
(3) (1853) 1 Sm. & Giff. 541.
(4) (1855) 3 W. R. 587.
(5) The Lands Clauses Consolidation Act, 1845, provides as follows:—
Sect. 82: "The costs of all such conveyances shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred, on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title."
(6) 25 L. R. Ir. 265.
(7) [1902] 2 Ch. 242.
(8) (1801) 1 East, 632.

on Copyholds, 7th ed. p. 198. The heir could forthwith have conveyed to the company.

Mossop, for the vendor's executors. In *Paramore* v. *Greenslade* (1) there was nothing in the conditions to throw the costs of concurrence of necessary parties on the purchaser. That, however, is effectually done by s. 82, and the only question is whether it covers the fine. Now, in *Re South Wales Ry. Co.* (2), Romilly M.R. refused to make the company pay a sum of 55*l.*, the costs of proceedings of getting a person appointed to surrender in the place of an infant heir of copyholds, holding that they were not bound to pay the costs of proceedings for the purpose of constituting a proper person to convey the estate to them. But in *Re Nash's Estate* (3) Wood V.-C. took a different view, and in *In re Liverpool Improvement Act* (4) Lord Romilly M.R. overruled his former decision in *Re South Wales Ry Co.* (2), so that it must be taken that the company were really bound to pay the 55*l.*, and this sum in all probability included the fine payable on the admission of the appointee.

In *Ex parte Keatley* (5) Porter M.R. allowed the costs of taking out administration to a former assignee of a lease, and also the costs of the assignment from the administrator. In *In re Lloyd and North London Railway* (*City Branch*) *Act*, 1861 (6), Stirling J., following *Ex parte Kelly* (7) and *Ex parte Rorke* (8), allowed the costs of taking out administration to eleven beneficiaries who had died since the money was paid into Court under s. 80.

In *Ex parte Lurgan Urban Council* (9) estate duty in respect of the purchase-money was allowed under s. 80.

In *In re Bear Island Defence Works and Doyle* (10) the War Department admitted their liability under s. 82 to pay the costs of taking out administration to a former owner, but contended that they were not liable for the death duties as these were already a charge on the property. Holmes L.J., however, held

(1) 1 Sm. & Giff. 541.
(2) (1851) 14 Beav. 418.
(3) (1855) 4 W. R. 111.
(4) L. R. 5 Eq. 282.
(5) 25 L. R. Ir. 265.
(6) [1896] 2 Ch. 397.
(7) (1893) 31 L. R. Ir. 137.
(8) [1894] 1 I. R. 146.
(9) [1902] 1 I. R. 157.
(10) [1903] 1 I. R. 164.

SWINFEN EADY J.

1906

LONDON UNITED TRAMWAYS ACT, 1900, *In re.*

that the distinction was wholly illogical; the duty would never have been enforced or paid if it had not been for the compulsory sale, and it could not be separated from the other expenses of administration. He also said that the question was the same whether costs of this nature were claimed under s. 80 or s. 82. It is said that we should have had to pay the fine quite apart from the sale. But in this respect there is no logical distinction between fine and duty. They are each a liability, but they are not enforced unless the attention of the lord or the Crown is called to them. The lord does not of necessity seize for want of a tenant. In the manor of Houndeane, for instance, John Earl of Sheffield, tenant on the rolls, died on May 30, 1821. His successor, George Augustus Frederick Charles Earl of Sheffield, died on May 5, 1876, without admission, and Henry North, the present Earl, was only admitted in August, 1905.

Again, the costs of constituting a proper person to convey include both fees and fine. In practice they are both paid before admission, though no doubt the admission is technically complete without fine paid: *Graham* v. *Sime* (1); *Barrow* v. *Barrow*. (2) But if the fine had not been paid, the lord would have seized immediately after the admission, and the heir would not have been able to convey to the company: Scriven on Copyholds, 7th ed. p. 214. The lord would in any case not have acknowledged or enrolled the heir's conveyance until the fine was paid.

Again, the company were liable for all incidents of tenure and other outgoings from the time they took possession, or at all events from April 4, 1903.

Christopher James, in reply. The company were not liable for this extraordinary outgoing, although an incident of tenure. *Re South Wales Ry. Co.* (3) only dealt with the costs of the proceedings instituted to get a person appointed to surrender in the place of the infant. It does not appear that the 55*l.* included a fine.

Re Nash's Estate (4), again, only dealt with the costs of a petition to appoint a person to convey in default of an heir

(1) 1 East, 632.
(2) 3 W. R. 587.
(3) 14 Beav. 418.
(4) 4 W. R. 111.

of a deceased mortgagee. *Ex parte Kelly* (1), *Ex parte Rorke* (2), and *In re Lloyd and North London Railway (City Branch) Act*, 1861 (3), were only decisions on s. 80. Stirling J. followed the Irish decisions on that section, but he would have felt difficulty in holding the company liable for the costs of subsequent administrations under s. 82, which, with all due deference to Holmes L.J.'s dictum in *In re Bear Island Defence Works and Doyle* (4), is much more limited than s. 80. In *In re Bear Island Defence Works and Doyle* (4) the vendor had a good holding title with which he was satisfied, and the duty would never have been paid apart from the compulsory purchase. In the present case the lord had made two proclamations, so that the fine would obviously have become payable quite apart from the purchase. If the company have to pay it, the estate is 250*l.* better off than if there had been no sale. If the argument of the vendor's executors is correct the lord obtained a sort of lien immediately on the admission. Now, the company would have to pay the expenses of a mortgagee's concurrence, but they would not have to pay the mortgage money. On what principle, therefore, can they be called on to discharge this quasi-lien? If the lord had seized for non-payment the company would have bought the freehold from him free of incumbrances.

Cur. adv. vult.

Feb. 8. SWINFEN EADY J., after stating the facts. The question is whether the fine and fees payable on the admittance come within the expression in the contract "vendor's costs of title and conveyance, as provided by the Lands Clauses Act, 1845." It has frequently been held, under that Act, that the company are bound to pay the costs of constituting a proper person to convey the property to them. Thus in *In re Liverpool Improvement Act* (5), where the corporation took some leasehold property after the death of the testator's executor and executrix, and it was necessary to obtain a grant of administration de bonis non in order to constitute a person to convey, Lord Romilly M.R. held

(1) 31 L. R. Ir. 137.
(2) [1894] 1 I. R. 146.
(3) [1896] 2 Ch. 397.
(4) [1903] 1 I. R. 164.
(5) L. R. 5 Eq. 282.

SWINFEN EADY J.

1906

LONDON UNITED TRAMWAYS ACT, 1900, *In re.*

that the corporation were bound to pay the costs of taking out this administration, and he overruled his own previous decision in *Re South Wales Ry. Co.* (1)

In this latter case the trustee of copyholds had died, leaving an infant as his customary heir. Proceedings were taken to obtain the appointment of a proper person to surrender the property in place of the infant, and the property was surrendered to one Henry Young, who was admitted feoffee in trust for the tenant for life and remainderman. The taxing master allowed the costs of all the proceedings to obtain a conveyance, which amounted to 55*l.* I have endeavoured to ascertain whether this amount included the fine payable on Henry Young's admittance, but I have been unable to do so, as the order does not appear to have been drawn up. Romilly M.R. overruled the taxing master, and said that he ought not to have allowed these costs. When, however, on a subsequent occasion, the same judge stated that he had come to the conclusion that the case of *Re South Wales Ry. Co.* (1) was wrongly decided, and in terms overruled that decision, which he said he believed stood alone, it was a distinct statement of his opinion that the 55*l.* ought to have been allowed.

The Master of the Rolls in Ireland took the same view of the statute in *Ex parte Keatley.* (2) In that case a vendor of leaseholds in possession, in order to make a title, had to procure a grant of administration de bonis non to a former assignee of the lease, and an assignment from such administrator de bonis non to himself. The taxing master allowed the costs of taking out administration, but not of the assignment. Porter M.R., reversing the taxing master, allowed also the costs of the assignment as a formal link requisite to complete the title, stating that the costs of formally completing the title should be borne by the company.

This decision was followed in other Irish cases, and these again were followed by Stirling J. in *In re Lloyd and North London Railway (City Branch) Act*, 1861 (3), where the costs payable by the company were held to include the costs of taking out

(1) 14 Beav. 418. (2) 25 L. R. Ir. 265.
(3) [1896] 2 Ch. 397, 402.

administration to each of eleven legatees who had died. The learned judge said: "It is very desirable that the practice should be the same in both countries, and I therefore follow the Irish Courts."

This decision came before the Court of Appeal in Ireland in *In re Bear Island Defence Works and Doyle.* (1) Porter M.R., affirming the taxing master, had allowed, as part of the costs of deducing title under s. 82, the costs of taking out probate or letters of administration, where necessary, and also the death duties. The War Department appealed to the Court of Appeal as regards the death duties, but the appeal was dismissed. Holmes L.J., in delivering the judgment of the Court of Appeal, referred to Lord Romilly's decision in 1868 in *In re Liverpool Improvement Act* (2), which he said had been followed in Ireland again and again. He then referred to Stirling J.'s decision in *In re Lloyd and North London Railway (City Branch) Act,* 1861 (3), and added that, notwithstanding Stirling J.'s doubt, he had been unable to find any trace of difference in the practice of the two countries. He further said that the attempt to distinguish between the duty paid to the Crown and the other costs of administration, on the ground that the former is a charge on the property, had, he believed, never been suggested before, and was wholly illogical.

Under these circumstances I consider that the construction of the statute is too well settled to be now open to question, at all events before me, and that the company are liable to pay the costs and expenses of proceedings taken for the purpose of constituting a proper person to convey or assure the property to them, including the costs of procuring the admission of a tenant of copyholds for that purpose.

A distinction was sought to be drawn between the steward's fees and the fine, on the ground that the latter did not become payable until after the admittance, and that, as soon as there was an admitted tenant, a person had been duly constituted to convey to the company, and that the payment of the fine was a subsequent matter with which the company had no concern. In

(1) [1903] 1 I. R. 164. (2) L. R. 5 Eq. 282.
(3) [1896] 2 Ch. 397, 402.

SWINFEN EADY J. 1906 LONDON UNITED TRAMWAYS ACT, 1900, *In re*.

my opinion this distinction is not well-founded. The fine which becomes payable on admittance is as much part of the expenses of procuring a proper person to convey as the steward's fees and legal expenses. A trustee, taking admittance and paying the fine, is entitled to have the fine declared a charge upon the copyhold estate: *Cole* v. *Jealous* (1), and could not be required to surrender the property to a purchaser or convey to the company without provision being made for the payment of the amount. The result is that the summons fails and must be dismissed with costs.

Solicitors: *Stanley, Wasbrough, Doggett & Baker; T. G. Bullen.*

G. R. A.

SWINFEN EADY J. 1906 *Feb.* 7, 14, 22.

In re LOVELAND. LOVELAND *v.* LOVELAND.

[1905 L. 2384.]

Will—Children—Illegitimate Children—Indication of Intention—Class Gift—Future Children—Uncertainty—Public Policy.

In class gifts a will speaks from death, and therefore a bequest to a woman's future illegitimate children, born in the testator's lifetime, and not defined by reference to actual paternity, is not uncertain or contrary to public policy—*secus*, a gift by deed.

Occleston v. *Fullalove*, (1874) L. R. 9 Ch. 147, and *In re Hastie's Trusts*, (1887) 35 Ch. D. 728, followed.

Loveland bequeathed his residuary estate in trust for "Daisy Dorcas Wootton (otherwise Daisy Dorcas Loveland)" for life and after her decease in trust for "all her children living at my decease" who being sons should attain twenty-one or being daughters should attain that age or marry.

The testator made this will just before starting by himself for the East, and knowing that his niece Daisy Dorcas Wootton, who had married him in Scotland, and was still living with him in the belief that her marriage was valid by Scottish law, was expecting her first confinement. Her child was born twenty-two days after the date of the will.

---

(1) (1845) 5 Hare, 51.

The testator, who was informed of the birth, died seven months later at Penang, without having seen the child:—

Held, that having regard to the surrounding circumstances, there was a sufficient indication on the face of the will to shew that the testator used the word "children" as including illegitimate children.

ORIGINATING SUMMONS.

By his will dated December 24, 1902, James Louis Loveland, after appointing Richard James Phillips, who predeceased him, executor and trustee, bequeathed (inter alia) the following legacies, that is to say:—

"To Daisy Dorcas Wootton (otherwise known as Daisy Dorcas Loveland) the sum of 500*l.*, which I direct shall be paid to her as soon as possible after my decease in priority to all other payments."

"To my father, Francis Lewis Loveland, the sum of 200*l.*"

"To each of my nephews Arthur and George, being the brothers of the said Daisy Dorcas Wootton (otherwise known as Daisy Dorcas Loveland), the sum of 250*l.*"

The testator gave and bequeathed his residuary real and personal estate to his trustee upon trust for sale and conversion, and directed him (after paying funeral expenses, debts, and legacies thereout) to invest the proceeds, and hold the same upon trust to set aside 500*l.* to be applied for the benefit of his brother Arthur Speller Loveland in such way as the trustee should think fit; and to set aside 500*l.* for his sister Frances Jessie Wootton, and to pay the income to her for her life for her separate use and subject to her life interest therein, to divide the same equally between such of her children as being sons should attain the age of twenty-one years or being daughters should attain that age or marry. "And subject as aforesaid I give and devise the whole of my said residuary estate to my trustee upon trust to invest the same as aforesaid, and to pay the income thereof to the said Daisy Dorcas Wootton (otherwise Daisy Dorcas Loveland) for her sole and separate use for life, but so that she shall not be able to dispose of the same by way of anticipation. And from and after her decease in trust for all her children living at my decease who being sons shall attain the age of twenty-one years or being daughters shall attain that

SWINFEN EADY J.
1906
LOVELAND, *In re.* LOVELAND *v.* LOVELAND.

age or marry under that age in equal shares. And if there shall be only one such child, the whole to be in trust for that one child. And if there shall be no child of the said Daisy Dorcas Wootton (otherwise Daisy Dorcas Loveland) living at my decease, then upon trust to pay the income to my said father, Francis Lewis Loveland, so long as he shall live, and after his decease to pay and divide my said residuary estate equally between my next of kin (other than my said father) per stirpes."

The will was made under the following circumstances:—

On December 21, 1900, the testator went through a form of marriage with his niece, Daisy Dorcas Wootton, aged nineteen, at Edinburgh, and the marriage was duly registered as if valid. From that time the niece, believing the marriage valid by Scottish law, lived with the testator, and was known as Daisy Dorcas Loveland, and addressed by the testator as his wife. On December 24, 1902, the testator made his will, just before starting by himself to the East on business, and knowing that his niece's first confinement was imminent. Her infant daughter was born on January 15, 1903, i.e., twenty-two days after the date of the will, and the testator was shortly after informed thereof.

On August 27, 1903, the testator died at Penang, without having seen the child.

On September 30, 1903, the niece, believing herself to be the testator's lawful widow, took out administration with the will annexed.

This summons was issued by the testator's father to determine (inter alia) whether, subject to the niece's life interest, the infant was entitled to the residue contingently on attaining twenty-one or marrying.

S. Parnell Kerr, for the testator's father. If the infant is not entitled at all, the testator's father takes a reversionary life interest under the gift over. If she is contingently entitled, but dies under twenty-one unmarried, he takes an absolute reversionary interest under an intestacy. Owing to his age, his interest is very remote on either hypothesis, and he therefore takes no part in the argument.

Wrangham, for the niece. The niece's life interest being undisputed, she takes no part in the argument.

Martelli, for the infant. It is clear that the testator intended the infant to take. His niece was enceinte at the date of the will, and he became aware of the infant's birth shortly after. He describes his niece by her maiden and married name, and he limits the class of her children to those born in his lifetime. Under these circumstances it is clear that he intended to provide for her illegitimate children born during the illegal coverture, which he obviously intended to continue, and that he did not contemplate her forsaking him and having legitimate children by a legal husband. There is nothing illegal in such a provision, so long as the class is not defined by reference to actual paternity: *Occleston* v. *Fullalove* (1); *Crook* v. *Hill* (2); *In re Bolton* (3); *In re Hastie's Trusts* (4); *In re Du Bochet.* (5)

Draper, for the testator's sister, mother of the niece, adopted the same argument.

Micklem, *K.C.*, and *Cox-Sinclair*, for the testator's brother. The word "children" must be read legitimate children, unless (*a*) the circumstances known to the testator at the date of the will render a strict construction impossible; or (*b*) a strict construction is possible, but it is clear upon the terms of the will, when applied to the state of facts at the making of it, that its terms never could have had full effect if confined to legitimate children. In class (*a*)—e.g., a gift to "Jane's children," Jane being dead at the date of the will and having left only illegitimate children—it is merely necessary to prove the testator's knowledge of the facts, and no indication on the face of the will is required. In class (*b*) some indication on the face of the will is a sine qua non, and, unless it is there, extraneous circumstances, though shewing the strongest probability of the testator's intention to provide for illegitimate children, cannot be used to alter the plain language of the will: *Warner* v. *Warner* (6); *Hill* v. *Crook* (7); *Dorin* v. *Dorin.* (8) The present case is an instance of class (*b*),

(1) L. R. 9 Ch. 147.
(2) (1876) 3 Ch. D. 773.
(3) (1886) 31 Ch. D. 542.
(4) 35 Ch. D. 728.
(5) [1901] 2 Ch. 441.
(6) (1850) 20 L. J. (Ch.) 273; 15 Jur. 141.
(7) (1873) L. R. 6 H. L. 265, 277, 280, 282–4.
(8) (1875) L. R. 7 H. L. 568, 575–7.

SWINFEN EADY J.
1906
LOVELAND. *In re.* LOVELAND *v.* LOVELAND.

as the niece might have married and had legitimate children. There is really nothing on the face of the will to indicate illegitimate children. Indeed, if the testator had contemplated providing for the niece's legitimate children, he could hardly have used more appropriate language. It is neither usual nor necessary to insert the word "legitimate." It was no doubt prudent to describe the niece by her two names for purposes of identification, but neither that double description nor the restriction of the gift to children born in the testator's lifetime affords any indication of an intention to provide for illegitimate children.

Again, a provision for future illegitimate children is uncertain and against public policy. In *In re Hastie's Trusts* (1) the testator referred to the co-habitation and to four natural children already born, so that there was a sufficient indication on the face of the will. But in holding that after-born illegitimate children could take, Stirling J. went beyond the earlier authorities.

In *Mortimer* v. *West* (2) Lord Lyndhurst L.C. held that illegitimate children born after the date of the will were excluded.

[SWINFEN EADY J. The law has developed since 1827.]

In *Hill* v. *Crook* (3) Lord Chelmsford and Lord Colonsay said that after-born illegitimate children could not take.

[SWINFEN EADY J. Those observations were obiter dicta, and are dealt with by James L.J. in *Occleston* v. *Fullalove*. (4)]

They were approved by Lord Selborne L.C. in his dissenting judgment. (5)

[SWINFEN EADY J. They were effectually negatived by the decision of James and Mellish L.JJ., who held that children born during the testator's lifetime could take.]

In that case there were existing illegitimate children. There is no authority that a testator can provide for a class of illegitimate children, none of whom are in existence at the date of the will.

Martelli, in reply.

Cur. adv. vult.

(1) 35 Ch. D. 728.
(2) (1827) 3 Russ. 370.
(3) L. R. 6 H. L. 265, 278, 280.
(4) L. R. 9 Ch. 159.
(5) L. R. 9 Ch. 154.

Feb. 22. SWINFEN EADY J., after stating the facts and reading the will. The question raised by this summons is whether, upon the true construction of the will, and in the events that have happened, the infant is contingently entitled to the residue, subject to her mother's life interest, or whether within the meaning of the will there was no child of Daisy Dorcas Wootton (otherwise Loveland) living at the testator's decease. To answer this question I have to consider whether there is, upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term "children," not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. In each case all the surrounding circumstances are to be taken into consideration. The lady whom the testator had taken as his wife in the presence of witnesses was still living with him as his wife; he refers to her in his will by the name which she took on the occasion of going through the form of marriage, and which she had since used, and which would have been her name had she been united to him in lawful wedlock; there is nothing in the will to suggest any intention on his part of separating from her; he provides for her, and for her mother and brothers, and for her sisters (if any), and in providing for her children he carefully limits the provision to her children who shall be living at his decease. Looking to the whole will, and to the relevant and admissible facts, I am satisfied, as matter of construction, that the word "children" is used by the testator as including illegitimate children, and that he intended to provide for all children born of the body of Daisy Dorcas Wootton, otherwise Loveland, during his lifetime or in due time after his death, although not born in lawful wedlock.

That such a gift is not invalid, either on the ground of uncertainty or as being against public policy, appears clearly from *Occleston* v. *Fullalove* (1) and *In re Hastie's Trusts.* (2) In the former case both James and Mellish L.JJ. pointed out that there was no uncertainty in ascertaining the children (though illegitimate) born of the body of a woman. A gift to

(1) L. R. 9 Ch. 147. (2) 35 Ch. D. 728.

SWINFEN EADY J.

1906

LOVELAND, *In re*. LOVELAND *v.* LOVELAND.

future illegitimate children, defined by reference to their paternity, will fail for uncertainty, as, in order to ascertain the persons, inquiries might be necessary which the law forbids; but these considerations have no application to the case of the children of a female. As to the question of public policy, Stirling J. in *In re Hastie's Trusts* (1) carefully reviewed the authorities and explained that the rule of law is that a gift by will to illegitimate children begotten before the death of the testator is good. A will speaks from the death of the testator, and is valid as regards gifts to illegitimate children then in esse. Illegitimate children to be begotten after the death of the testator cannot be provided for by will—nor can future illegitimate children be provided for by deed; but so long as the provision is limited to children in esse when the document takes effect, it is more in accordance with public policy that provision should be made for them than that such a provision should be beyond the scope of the law and that the unfortunate offspring should become a burden on public funds. I therefore determine that, subject to her mother's life interest, the infant is entitled to the residue contingently on attaining twenty-one or marrying.

Solicitors: *Walter A. Jennings; Thomas Charles.*

(1) 35 Ch. D. 728.

G. R. A.

HOOPER *v.* HERTS.

C. A.
1906
Feb. 13, 14.

[1904 H. 1394.]

Company—Shares—Transfer—Blank Transfer—Mortgage—Filling in blank by Mortgagee—Refusal to Register—Implied obligation of Transferor not to hinder Registration—Derogation from Grant—Damages.

Upon a transfer for value of shares in a limited company the transferor is under an implied obligation, arising from the relation of grantor and grantee constituted between the parties by the transfer, not to prevent or delay the registration of the transferee as owner of the shares.

W. executed a transfer in blank of certain shares in a mining company of which he was the registered owner, and handed over the blank transfer and the share certificate to H. with authority to raise money upon them for H.'s own use. At H.'s request the plaintiff obtained from a bank a temporary loan to himself on the security of the blank transfer and share certificate, and paid over the money to H. upon H. undertaking to repay the loan and authorizing the transfer of the shares to the bank or their nominee in default of payment. Default having been made in payment by the plaintiff and by H., who absconded, the bank, with the plaintiff's concurrence, filled in the plaintiff's name in the blank transfer, and the plaintiff executed the transfer, under circumstances which precluded W. from asserting that the transfer was unauthorized. The transfer having been lodged at the company's offices for registration, W. put a stop on the registration. The shares subsequently fell in value:—

Held, that W. was under an implied obligation to the plaintiff not to delay registration, and that the plaintiff as mortgagor had a sufficient interest in the shares to entitle him to claim damages for the breach of that obligation.

Appeal from a decision of Kekewich J.

On January 8, 1904, the Rev. A. Whatton, who was associated with Mr. A. Carlisle Herts, a company promoter, in certain speculative dealings in shares, delivered to Herts a transfer executed by him in blank of 1467 shares in the Smelting and Refining Company of Australia (1901), of which he was the registered owner, together with the certificate of the shares, and verbally authorized Herts to obtain a temporary loan on the security of the shares for his (Herts') own private use. On January 13, 1904, Whatton wrote to Herts, "With regard o the

C. A. 1906 HOOPER v. HERTS.

Smelting shares, I am anxious to know what you have done or can do. Please don't postpone the matter if you have not already seen about it. One ought to be able to borrow on those shares up to a good value at 4 per cent."

In the meantime, on January 9, Herts obtained from the plaintiff, Mr. Charles Hooper, to whom he was indebted in the sum of 150*l.* for rent, an advance of 50*l.*, and deposited with him the blank transfer and certificate as security for the advance, and on January 12 he obtained from the plaintiff a further advance of 50*l.*

On January 14, he applied to the plaintiff to procure him a loan of 700*l.* on the security of these shares. The plaintiff being unable to find the money himself, applied to the Mines and Banking Corporation to lend him the money. The corporation, upon being shewn Whatton's letter of January 13, agreed to lend to the plaintiff 700*l.* upon the security of the shares with interest at 10 per cent., the loan to be repaid within fifteen days from being made. Herts, upon being informed by the plaintiff of the decision of the corporation, wrote him a letter whereby he authorized him to raise 700*l.* on the shares at 10 per cent. interest, deducting from the amount so obtained 150*l.* for rent and 50*l.* for cash advanced on January 12, and undertook to indemnify him against any loss arising from the transaction, and if necessary to redeem the shares in two weeks' time. The plaintiff thereupon handed to the corporation the blank transfer and share certificate and received from them the sum of 700*l.* This sum he paid to Herts by three cheques of 450*l.*, 200*l.*, and 50*l.* Herts indorsed the cheque for 200*l.* and returned it to the plaintiff and kept the other two cheques. He then signed the following receipt, dated January 14, 1904: "Received of Charles Hooper the sum of seven hundred pounds (700*l.*), amount advanced by the Mines and Banking Corporation, Limited, at the rate of 10*l.* per cent. per annum interest, on 1467 fully-paid 7 per cent. preference shares in the Smelting and Refining Company of Australia, on the understanding that the amount be repaid in fifteen days or the shares may be transferred into the name of the corporation, or their nominee, and in the event of any sale of same being effected, the difference

between the amount obtained and the 700*l.* with interest, if any, to be made good by me."

The plaintiff asked Herts to return him the cheque of 50*l.* in repayment of the advance made by the plaintiff to Herts on January 9, but upon Herts representing to the plaintiff that he could not then spare the money and promising to repay the 50*l.* in a few days the plaintiff allowed him to keep the cheque. This money was never repaid. On March 25, 1904, the loan of 700*l.* not having been repaid by either the plaintiff or Herts, the corporation, with the assent of the plaintiff, filled in the blank transfer with the plaintiff's name. The transfer was then executed by the plaintiff, and was lodged by the corporation together with the certificate at the offices of the Smelting and Refining Company of Australia for registration. Whatton, on receiving notice from the company that this transfer had been lodged for registration, replied that the transfer was not in order and should not be completed, and on March 28 the company informed the plaintiff of Whatton's objection and intimated to him that the passing of the transfer would be delayed until receipt of further instructions from Whatton. The shares had since greatly fallen in value and were now practically unsaleable.

On April 30, 1904, the plaintiff commenced this action against Herts and Whatton, claiming against Herts repayment of the 700*l.* with interest at 10 per cent., and against Whatton a declaration that by virtue of the deposit with the plaintiff of the said transfer and certificate the plaintiff was entitled to a mortgage or charge on the shares for the amount of the loan and interest, with consequential relief.

The plaintiff subsequently amended his statement of claim by alleging that the defendant Whatton was under an implied contract or obligation not to do anything to prevent or delay the registration of a bona fide transferee for value of the shares as owner thereof, and that he had broken such implied contract or obligation, and by adding a claim for damages for the breach of the said contract or obligation.

Shortly after the commencement of the action Herts was adjudicated a bankrupt and absconded. In August, 1904, the plaintiff paid off the corporation.

C. A. 1906 HOOPER v. HERTS.

The defendant Whatton pleaded that the loan to the plaintiff was made without his authority, and stated in the witness-box that the authority given to Herts to obtain a temporary loan for his own purposes was subject to two conditions: first, that he, Whatton, approved the terms upon which the money was to be raised; and, secondly, that Herts first satisfied his (Whatton's) own need.

The action was tried on February 15 and 16, 1905.

Kekewich J., upon the question whether the plaintiff was entitled to a charge on the shares, held that Whatton must be taken to have authorized the loan to the plaintiff, since he gave the blank transfer and share certificate to Herts and authorized him to raise money on the shares for his own purposes, and did not give notice of any limitation of the authority to any third party. The plaintiff was therefore entitled to a declaration of charge. With regard to the question of damages his Lordship had no doubt that an action might be maintained by a transferee of shares against a transferor who had put a stop on the registration of the transfer for any loss occasioned by the delay in the registration; but his difficulty was that at the time when the action was brought the plaintiff could not have sold the shares for his own benefit, since he had not then paid off the corporation, and was only their nominee, and was not entitled to be subrogated to the rights of the corporation as against Whatton. Therefore, in his Lordship's opinion, the plaintiff had suffered no damage, and was not entitled to relief on this part of the case, and he dismissed the claim for damages without costs.

The plaintiff appealed from this judgment in so far as it dismissed the claim for damages.

P. O. Lawrence, *K.C.*, and *T. B. Napier*, for the plaintiff. This appeal is from the dismissal of the plaintiff's claim against Whatton for damages, and the real question is whether the plaintiff can sue him for damages for having stopped the transfer of the shares. Our case is that Whatton, having executed a blank transfer of the shares, was, according to the authorities, under an implied obligation not to do anything to stop that

transfer from being completed: *London Founders Association* v. *Clarke* (1); *Skinner* v. *City of London Marine Insurance Corporation*. (2) Those two cases shew the form of order we ask for. It is the breach of that obligation that has caused damage. There is no such difficulty here as arose in *France* v. *Clark* (3) and *Ex parte Sargent* (4), for everything was done properly with the knowledge and authority of Herts and Whatton, and Whatton cannot stand in a better position than Herts. A person giving a blank transfer thereby enters into an obligation with any person whose name is properly inserted as transferee: it is a contract by him that anybody lending money on the faith of that transfer shall be given a good and sufficient security; otherwise a blank transfer is of no use at all. Nothing remained to be done here but the purely ministerial act of registration: *Moore* v. *North Western Bank*. (5)

[ROMER L.J. referred to *Re East Wheal Martha Mining Co.* (6), where it was held that a company cannot be compelled to register a transfer without the certificate being left with them for inspection.]

We submit that the plaintiff has a good equitable charge for the liability he is under to the Mines Corporation: *Gurney* v. *Seppings*. (7) The implied obligation not to interfere with the completion of the transfer is not confined to the case of a transfer of shares. This is analogous to the ordinary case of selling a chattel and a refusal by the vendor to allow delivery of the chattel. In every contract there is an implied obligation on the part of the contractor to do nothing inconsistent with the contract; and it does not matter that the contract was entered into through the instrumentality of an agent. If the plaintiff's case is put upon estoppel the same result follows; the estoppel extends to all the legal incidents of the transfer. In the Court below it was held that at the date of the writ the plaintiff had no sufficient interest in the shares to entitle him to sue for damages, but, first, the plaintiff had rendered himself personally liable to

(1) (1888) 20 Q. B. D. 576, 582.
(2) (1885) 14 Q. B. D. 882, 887.
(3) (1884) 26 Ch. D. 257.
(4) (1874) L. R. 17 Eq. 273.
(5) [1891] 2 Ch. 599.
(6) (1863) 33 Beav. 119.
(7) (1846) 2 Ph. 40.

C. A. 1906 HOOPER v. HERTS.

pay the debt to the corporation; secondly, by the receipt of January 14 the shares were either mortgaged to the plaintiff or allocated to the debt; thirdly, Whatton could not have got the shares from the plaintiff until he had either paid the corporation or relieved the plaintiff from his liability. The plaintiff was an equitable mortgagee of the shares although he had parted with the shares to the corporation. There were really two mortgages on the shares, one from Herts to the plaintiff, the other from the plaintiff to the corporation. Further, the plaintiff, with the assent of the corporation, had the legal right to sue on the transfer. It could not be said that the mortgagor and mortgagee together could not have sued for damages, and if the mortgagor is placed by the mortgagee in the position of having the legal right to sue, there is no ground for holding that he is not entitled to sue. The measure of damages is the difference between the value of the shares at the date when the stop was put upon the registration and their value when the plaintiff could have procured the removal of the stop, i.e., when he obtained a declaration that he was entitled to a charge on the shares: *Sanders* v. *Kentish* (1); *Tempest* v. *Kilner* (2); *Owen* v. *Routh*. (3)

Stewart-Smith, K.C., and *Cozens-Hardy*, for the defendant Whatton. The plaintiff's rights against Whatton arise by estoppel only. The obligation on the vendor upon a sale of shares to do nothing to prevent registration attaches, not to the transfer itself, but to the antecedent contract for sale: *Skinner* v. *City of London Marine Insurance Corporation*. (4) The transfer merely carries out the contract. There is no implied warranty in a transfer.

[COZENS-HARDY L.J. You are derogating from your grant. There was an antecedent contract for value, and you cannot now say that the plaintiff had not a valid mortgage.]

Whatton is estopped from saying that the transfer does not vest the shares in the plaintiff as security, but there is here no antecedent contract between Whatton and the plaintiff from which it is possible to infer an agreement on the part of Whatton

(1) (1799) 8 T. R. 162.
(2) (1846) 3 C. B. 249, 253.
(3) (1854) 14 C. B. 327.
(4) 14 Q. B. D. 882, 887.

not to delay the registration. Therefore, the action must fail so far as it is based on breach of contract. Except by estoppel Herts could not confer on the plaintiff any better title than he had himself, and he could only bind Whatton to the extent of his authority. There is here no privity of contract between the plaintiff and Whatton. If the plaintiff were a beneficial transferee, his right to damages could not be contested, but at the date of the writ he was a mere nominee for the corporation and was not a transferee in his own right, and at that date neither he nor the corporation had suffered any damage.

[ROMER L.J. I cannot agree that the plaintiff had no beneficial interest in the shares at the date of the writ.]

He could not deal with the shares until he had paid off the bank.

P. O. Lawrence, K.C., in reply.

COLLINS M.R. This is an appeal from a decision of Kekewich J. upon one point. The plaintiff claimed a declaration that by virtue of the deposit with the plaintiff of a transfer in blank signed by the defendant Whatton of 1467 shares of a certain company then standing in the name of that defendant in the books of the company and of the certificate of such shares by the defendant Herts under the authority of the defendant Whatton the plaintiff was entitled to a mortgage or charge on such shares for 700*l.* and interest. The learned judge made the declaration in the terms asked for by the plaintiff. Herts dropped out of this discussion at an early stage, and we have only to deal with Whatton. The shares in question are now of little or no value, and therefore the declaration was not of any great pecuniary advantage to the plaintiff. But the plaintiff had also introduced by amendment a claim for damages for breach of the implied contract or obligation by the defendant Whatton not to do anything to prevent or delay the registration of a bona fide purchaser for value of the shares referred to. The learned judge, having found in favour of the plaintiff upon the claim for a declaration of charge, felt a difficulty in allowing the claim for damages, and in point of fact he held that there was an obligation on the part of the defendant to the plaintiff and a breach of that obligation, but that in the circumstances the

C. A. 1906 HOOPER v. HERTS. Collins M.R.

plaintiff was in such a position that he could not prove that he had sustained any damage by virtue of the breach. It is upon that point that the appeal comes before us. The decision of the learned judge has narrowed the points in controversy before us very much; it has cut away (because the defendants are not appealing here) a point that might have been raised as to the invalidity of the transfer by the defendant Whatton to the plaintiff Hooper. Shortly stated, the circumstances were as follows: Herts was a person engaged in financial operations. Whatton, the defendant, was a clergyman, who appears also to have embarked in some speculative transactions; at all events, the relations between him and Herts appear to have been intimate, and the learned judge found that Whatton was in the hands of Herts to a great extent. Whatton was possessed of the shares in question, and he was desirous of raising money upon them. He had been, apparently, joint adventurer with Herts in some former transactions, and Herts also was in need of money, and there seems to be no doubt upon the evidence that Whatton was willing that Herts should use the shares belonging to Whatton as a security for a temporary loan to be raised by Herts for his own purposes. I think he was also desirous, but at a later date, of raising money himself upon them. Now, the machinery which he adopted to bring about this result was that he put into the hands of Herts a blank transfer of 1467 preference shares in the company named, and he also handed him his certificate of those shares for the purpose of enabling him to raise this temporary loan. Herts then went to Hooper, and obtained from Hooper, on the security of this transfer and the certificate, one or two advances of comparatively small amount; but more money was wanted, and Herts took steps to induce Hooper to raise it from a bank called the Mines and Banking Corporation. Herts might have had considerable difficulty in raising the money himself. Accordingly, Hooper, armed with the transfer and the certificates, put himself into communication with the bank, and they found him 700*l.* upon the deposit of those securities with them.

The result of that transaction, as between Herts and Whatton, appears to have been that Whatton had put himself in such a

position that he could not impugn the title of Hooper or of the bank from whom Hooper had got the advance to deal with the transfer in the way they did deal with it; and the way in which they dealt with it was as follows: Herts not returning the money, as he, of course, undertook to do, the bank naturally began to press for payment. Hooper was responsible to them for the money that they had advanced, and they had the security of the transfer and the certificate which he had handed to them; and Hooper had a charge upon them to the extent of his own liability. In this state of things the bank, with the concurrence of Hooper, filled in Hooper's name in the transfer, so as to make it a transfer from Whatton to Hooper. The bank and Hooper were acting together, and the transfer was filled in in this way for the common purpose, as it seems to me, of realizing all that could be got out of the securities. The bank then applied in ordinary course to the company to register the transfer, and then comes the act on the part of the defendant Whatton which gives rise to the suggested cause of action which is the matter in controversy on this appeal. On March 26, 1904, Whatton, instead of assisting in carrying out the transfer, which he was estopped from denying, wrote to the company putting a stop to the registration, with the result that the shares could not be registered, and any attempt on the part of Hooper or of the bank to realize the security was suspended, and it was not until the date of the judgment in the action in February, 1905, that the stop was taken off. In the meantime the shares had depreciated in value so much that it is very doubtful whether they have any value at all at the present moment.

It is said that they had some considerable value at the time when the stop was put on; and the question is now whether under these circumstances Hooper has any right of action against Whatton. That depends upon the question whether a registered holder of shares who has transferred the shares, I will assume for value, is under an obligation not to do anything to hinder his transferee from getting the full benefit of the transfer. Upon this question there is a passage in the judgment of Lord Esher M.R. in *London Founders Association* v. *Clarke* (1)

(1) 20 Q. B. D. 576.

C. A. 1906 HOOPER v. HERTS. Collins M.R.

which is in point, but before reading that passage I will state the facts of that case from the head-note: "A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company. The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use." The Court held "that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable." The contention of the plaintiffs in that case was that the price was recoverable on the ground of a total failure of consideration. Lord Esher, after expressing his opinion that it was impossible to accede to that contention without contravening what was said by the Court of Exchequer Chamber in *Stray* v. *Russell* (1), said this (2): "I have no doubt that the seller must not prevent or do anything to prevent the company from accepting the purchaser or his nominee. What the remedy would be, if he did, it is unnecessary now to consider. There is nothing here to shew that the seller in this case did anything of the kind." Again, later on he says: "The purchaser takes that risk on himself" (that is, the risk of the company approving the transfer), "and the seller's liability is satisfied by handing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser."

The learned judge in the Court below had no doubt whatever upon that part of the case. He thought that an obligation had arisen upon Whatton not to interfere with the lawful result of anything done under the authority of that transfer; and

(1) (1860) 1 E. & E. 916. (2) 20 Q. B. D. 582.

therefore the only question in his mind was whether, there being a breach of that obligation on the part of Whatton by intervening and stopping the registration of these shares, the plaintiff was in a position to claim damages. Before us the point has been raised, and insisted upon, that there is no such obligation as that acted upon by Kekewich J. to the extent I have named, and asserted as existing by Lord Esher. That point has been argued before us by counsel for the respondent, and they also rely strongly on the other point, which Kekewich J. decided in their favour, that the plaintiff is not in a position to claim damages.

Now, to take the first point first, it seems to me quite clear, and for the reasons given by Lord Esher, that there does arise out of the relation constituted between the parties by the transfer an obligation or a duty that the grantor shall do nothing to interfere with the grantee getting the benefit of his grant. That, it seems to me, is the principle asserted—that there is an obligation arising out of the relation of the parties. It is not one which is in express terms contracted for between the parties, and it is not to be found in express terms in the transfer itself. The transfer itself contains the grant by which the relation between the parties of grantor and grantee is created, and that carries with it an obligation, as it seems to me, on the part of the grantor not to interfere with the full fruition by the grantee of what the grantor has purported to give him under the grant. That seems to me enough to establish the obligation, and the breach of it is not denied.

We now come to the question of damages: Aye or no, Is the plaintiff in this case entitled to claim damages? My first answer to that is, Why not? Here is a legal transferee suing a legal transferor for an admitted breach of a personal obligation. Prima facie there is a clear right in a legal transferee who is entitled to the performance of a particular obligation to have damages paid to him measured by the loss which he in his legal position as owner can be fairly said to have suffered by reason of the breach of that obligation. Now, why is he not entitled to have damages? The suggestion made is that his right in this case was not a beneficial right in himself;

C. A. 1906 HOOPER v. HERTS. Collins M.R.

but that contention must go thus far to be of any use at all, that he was a mere nominee of the bank, and therefore has no right of action in himself at all—that he is merely their *prête-nom*; that in order to see whether there is a right to damages it must be assumed that the real parties to the action are those for whom he is the nominee; and that inasmuch as the bank, who have lent this money, have got the security of a solvent person, namely, Hooper, they cannot complain that they have suffered anything by the interference by the defendant with the complete fruition of the shares comprised in the transfer. The argument comes to this, that since Hooper can and will pay them, they cannot sue, and though Hooper must and will pay them, he cannot sue either. It seems to me that is to shut one's eyes to the common sense of the matter in endeavouring to appreciate a very subtle equitable distinction.

I think we are entitled here to look broadly at the facts. It is not the case of Hooper putting in suit his rights against the rights of the bank; on the contrary, he and the bank are acting together in this matter for the common purpose of realizing their security to the best advantage, having regard to their relations. Undoubtedly, as between the lenders, the bank, and Hooper, the value of that security would come in in reduction of the obligation of Hooper to the bank, and the person primarily interested (since he was the person who would ultimately have to pay on any hypothesis) in introducing the value of that security into the discussion was Hooper. If those shares could be realized, the realization would enure ultimately for the benefit of Hooper, because it would reduce his obligation to the bank, if the bank took the security. If, on the other hand, he paid off the bank, then he would apply the security in mitigation so far as it would go of his own damages. Applying to this case the ordinary standards by which damages are measured at common law, and treating it as a case in which the damages were being assessed by a jury, it would be the duty of the judge to tell the jury that they must look at the matter reasonably, and say what, as reasonable men, they would expect to be the damages which would be suffered by a person in Hooper's position under these circumstances. A

jury are not bound to ascertain absolutely and with mathematical nicety the precise amount of damage sustained, but looking at the reasonable probabilities of the case they must compensate the plaintiff as far as they can for the loss which, in their view, having regard to all the circumstances of the transaction, he has suffered arising naturally out of the breach for which the defendant is responsible. In this case the act of the defendant has deprived the persons entitled thereto of the benefit accruing from the right to deal with the shares at the time when the defendant entered into his obligation. If that right existed Hooper was the person in law, as between him and the defendant, who was entitled to the benefit of it. It might be enough as against Whatton to say: "You are the transferor in this matter, and you cannot as against your transferee set up these nice considerations, or go behind the real transaction." But if we do go behind the transaction we must not take leave of our common sense; and if we find that taking all the equities into consideration the net result of the matter is that the bank are not sufferers only because they get paid by Hooper, then, if they get paid by Hooper, why should not Hooper get the benefit to which he was entitled from the transferor? It seems to me that the person who really suffers from the action of Whatton, namely, Hooper, is the person who is entitled to receive the damages from him. Therefore I am unable to take the view which the learned judge has taken upon this point, and I think that his mistake was in treating Hooper as a person who was merely, as Mr. Cozens-Hardy in his short and perfectly logical argument suggested, a person with no beneficial interest. But the real point in this case is, that Hooper was not a mere nominee, but was the person beneficially interested in the realization of the security. If he had been, as Mr. Cozens-Hardy very ingeniously argued, a mere abstraction X., merely lending his name for the purposes of the writ, then I should have accepted Mr. Cozens-Hardy's position; but Romer L.J. during the argument declined to take the first step, and I do not feel any more inclined to take it than he did. The result is that there is a right to damages measured by the loss to Hooper. What is the loss to Hooper? Hooper lost

C. A. 1906 HOOPER v. HERTS. Collins M.R.

what he might have got by realizing the security at the time of the breach. That does not seem to me to involve that he must be taken as bound to force the whole of those shares on the market at one and the same time. I think, if the matter were before a jury, they would be asked to estimate, as reasonable men, what a person anxious to realize the security to the best advantage, not taking an undue time about it, but dealing with it prudently, would have got for the shares—what would have been the value of the shares realized to the best advantage, having regard to the nature of the shares, the state of the market, and the possible depreciation of the shares by waiting an undue time, and the loss to Hooper is measured by the difference between the value of the shares at the time when he ultimately got the dominion of them and their value supposing he had had the opportunity of realizing them in the manner I have suggested. That will be the standard, and that will have to be ascertained by the Master. It is not a case of a given sale on a particular day. The Master will have to consider all the circumstances, the amount of shares to be disposed of, and the prices, so far as he can ascertain them, ruling at the time. The appeal must be allowed, and there must be the inquiry I have suggested.

ROMER L.J. I am of the same opinion. The learned judge in the Court below has found—and there is no appeal from that part of his judgment—that the transferor of the shares, Whatton, must be held to have authorized what was in fact done in this case with regard to the shares, viz., the charge in Hooper's favour, the subsequent mortgage of the shares by Hooper to the Mines and Banking Corporation, and the filling in in the blank transfer executed by Whatton of the name of Hooper as transferee. That being so, as between Whatton and Hooper, Whatton is in the position of a transferor to Hooper, and it is to be noticed that Hooper has a direct interest in the shares, not only as nominee of the Mines and Banking Corporation, but in his own right as equitable mortgagee before the mortgage to the corporation, and because of his position as mortgagor to the corporation. When for the purposes of the corporation, or of

the corporation and Hooper, Hooper's name was put in as transferee of these shares, it appears to me impossible to say that Hooper in regard to that position is to be considered as having no interest whatever in the shares except as a mere nominee for the corporation. I think on the facts he must be taken to have been put in as nominee because he also occupied the position of mortgagor and had otherwise an interest in these shares. Therefore, it appears to me that the defendant Whatton cannot say as against Hooper that the latter as transferee has no interest of his own in these shares.

It is not necessary to decide the point, but I should like to point out that I am not at all sure that any difference would arise in this case if Hooper's name had not been put in as transferee and a third name had been put in. I am not at all sure that even in that case it could not be said on behalf of Hooper and of the corporation that the name of that third person had been used for the purposes of both. But I need not consider that in this case. It is sufficient to say here that, to my mind, it is established that Whatton is the transferor of these shares to Hooper, and that Hooper has acquired the position of transferee for valuable consideration.

Under these circumstances, I have no doubt that there is an implied duty or obligation, as between Whatton and Hooper, that Whatton will do nothing to prevent Hooper being put on the register of shares so as to acquire the full benefit to be derived from the transfer. What happened was this. An application was made to the Smelting and Refining Company of Australia to register Hooper's name as transferee. At the date of that application there was no dispute of any kind between the corporation and Hooper—in fact, there never has been any dispute between those two in this matter. They have always acted amicably, their interests being practically identical. That application having been sent in, registration, but for the conduct of Whatton which I am about to refer to, would have followed in due course, and that registration, as I need scarcely point out, would have enured for the benefit of Hooper and of his mortgagees, the corporation. What happened then was this. Whatton gave notice to the company the shares of which were

C. A. 1906 HOOPER v. HERTS. Romer L.J.

the subject of the transfer not to recognize the transfer, representing, in fact, that the transfer was not valid as against him. To my mind, that was a clear breach of the duty or obligation he owed to Hooper. The result of that breach of duty was that the shares were not registered. Who suffered from that? Hooper certainly suffered from it. He, the transferee, whose name ought to have been put on the register, by this breach of duty towards him on Whatton's part, failed to get on the register. By reason of that breach of duty Hooper, as representing himself and his mortgagees, failed to get any benefit from the transfer until the judgment in this action when his right to have the transfer perfected by registration was decided against Whatton. To my mind, it is clear that damage has been caused by the delay which has arisen by reason of Whatton's breach of duty towards Hooper, for it is admitted that between the date when this transfer ought to have been registered, and when, if the registration had been proceeded with, Hooper, as representing himself and his mortgagees, could have obtained the full benefit of these shares, and the time when he ultimately succeeded in getting a decision in his favour upon this point, there was a falling off in the value of the shares. To my mind, the damage caused by that delay is the difference between those two values. I really can add nothing to what the Master of the Rolls has said as to how that damage ought to be estimated. In estimating the value of those shares at the time when registration ought to have been effected the Master must try to ascertain the value in a reasonable way. Of course, amongst other considerations he would bear in mind that the large number of shares involved in this transfer was such that probably they could not have been sold on the market in one block, but must have been disposed of by degrees. That and all other material considerations bearing upon the question, I should hope without any special directions from us, will be taken into consideration by the Master.

With regard to the proceedings by Hooper, Hooper, to my mind, when he started this action, must be held to have made his claim for damages for delay on behalf of his mortgagees, assuming that they had suffered any damage, as well as on his

C. A.
1906
HOOPER
v.
HERTS.
Romer L.J.

own behalf; but in the events which have happened, seeing that pending the trial he has paid off those mortgagees, it follows that the full amount of the damages which will be found as the result of the inquiry before the Master must be paid to him. The judgment of Kekewich J. will be varied as follows: Discharge so much of the judgment as dismisses the claim for damages and in lieu thereof direct an inquiry as to damages, reserving the costs of the inquiry. Order the respondent to pay so much of the costs of the action as related to the claim for damages and the costs of the appeal.

COZENS-HARDY L.J. I am of the same opinion, and I have nothing to add.

Solicitors: *G. L. Matthews & Co.; Thorp & Saunders.*

H. B. H.

In re MARK WHALLEY AND *In re* W. R. WHALLEY.

C. A.
1906
Feb. 26.

Lunacy—Person of unsound Mind not so found—Management and Administration—"Lawfully detained"—Jurisdiction—Idiots Act, 1886 (49 & 50 *Vict. c.* 25), *s.* 5—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*c*).

The expression "lawfully detained as a lunatic though not so found by inquisition," as used in s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890, means "lawfully detained" under the provisions of the Acts of Parliament of this country; and consequently there is jurisdiction to make administrative orders in the case of a person of unsound mind not so found who is detained in accordance with the Idiots Act, 1886.

In re Watkins, [1896] 2 Ch. 336, explained and distinguished.

ADJOURNED SUMMONS.

The only question raised by this application was as to the jurisdiction of the Court under the Lunacy Act, 1890, s. 116, sub-s. 1 (*c*), to make an order for the appointment of a committee of the estate of a person of unsound mind though not so found by inquisition, but detained in an asylum for idiots under the provisions of the Idiots Act, 1886.

Mark Whalley and William Roebuck Whalley, brothers, aged respectively 63 and 57 years, were persons of unsound mind though not so found by inquisition.

In October, 1872, William Roebuck Whalley was received into

C. A. 1906 — MARK WHALLEY, *In re*, AND W. R. WHALLEY, *In re*.

Earlswood Asylum for Idiots, and in October, 1881, Mark Whalley (who had previously been detained as a private patient at Munster House, Fulham) was received into the same institution; from the date of their admission up to the present time both brothers had been detained in Earlswood Asylum since 1886 under the provisions of the Idiots Act, 1886.

After their reception into this asylum the lunatics' monetary affairs and maintenance had been attended to by their brother Daniel Whalley, until his death in February, 1897, from which time their affairs were managed by a cousin, one A. J. Whalley, until his death in November, 1905. The trustees of an estate from which the lunatics derived their income, being now anxious that a committee of their estates should be appointed, so as to enable them to get a valid discharge for any moneys paid by them on behalf of the lunatics, two summonses were taken out in the matter of Mark and W. R. Whalley, "persons alleged to be of unsound mind," by a cousin, one Frederick Henry Whalley, asking that he might be appointed the committee of their estates on such terms as the Court might direct. In accordance with the practice of the Lunacy Office the summonses were filled in as being made under s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890. One of the Masters in lunacy having expressed some doubt whether, having regard to some of the observations of the Lords Justices in *In re Watkins* (1), the expression "lawfully detained as a lunatic though not so found by inquisition," as used in s. 116, sub-s. 1 (*c*), ought not to be confined to persons "lawfully detained" under the provisions of the Lunacy Act, 1890, the summonses were referred to one of the Lords Justices, who adjourned them into Court to have this question argued.

Eve, K.C., and *T. T. Method*, for the applicant. The Earlswood Asylum is a properly licensed and registered institution. When these persons were admitted all the formalities of the Lunacy Acts then in operation were duly complied with. The Idiots Act, 1886 (49 & 50 Vict. c. 25), s. 5, specially provides for the retention and admission of idiots and imbeciles in institutions of this kind, and it is clear that they are now lawfully

(1) [1896] 2 Ch. 336.

detained under the provisions of the Idiots Act. The Lunacy Act, 1890, s. 340, sub-s. 2, enacts that the provisions of the Idiots Act, 1886, are not to be affected, and by s. 341 "lunatic" means an idiot or person of unsound mind. The lunacy officials consider themselves bound by the observations of the Lords Justices in *In re Watkins* (1), to the effect that "lawfully detained" means lawfully detained under the provisions of the Lunacy Act, 1890; but when that case is examined it will be found that these observations must be read in connection with the particular case then under consideration, the only point being whether the Court had any jurisdiction to make an administrative order in the case of a person detained out of England by the laws of a foreign country. That case is plainly distinguishable. If necessary the summonses could be amended and the application renewed under s. 116, sub-s. 1 (*d*); but we submit that "lawfully detained" must mean lawfully detained under the provisions of the Acts of Parliament of this country.

COLLINS M.R. It seems to me that this point is free from difficulty when one looks at the Lunacy Act, 1890, and at the case of *In re Watkins* (1), which is the only authority which has been referred to on the question now before us. Sect. 116, sub-s. 1, of the Lunacy Act, 1890, under which the question arises, is as follows: "The powers and provisions of this part of this Act relating to management and administration apply," inter alia, "(*c*) To every person lawfully detained as a lunatic though not so found by inquisition." There was in existence at the date of the passing of this Act, and there is still in existence, an Act of 1886 providing for the care of idiots known as the Idiots Act, 1886 (49 & 50 Vict. c. 25), which contains provisions authorizing the admission and retention of idiots and imbeciles after they are of full age upon the certificate of a qualified medical practitioner and on complying with certain other formalities: I refer particularly to the provisions of s. 5. It is admitted in the case now before us that all the conditions and formalities prescribed by the Acts of Parliament in force at the time of the admission of these persons have been

(1) [1896] 2 Ch. 336.

C. A. 1906

MARK WHALLEY, *In re*, AND W. R. WHALLEY, *In re*.

Collins M.R.

complied with, and it is clear that they are now lawfully detained in Earlswood Asylum under the provisions of the Idiots Act, 1886; but it has been suggested that as these persons are not detained under the Lunacy Act, 1890, there is no jurisdiction, under s. 116, sub-s. 1 (*c*), of that Act, to make an order for the appointment of a committee of their estates. In my opinion s. 116, sub-s. 1, does not purport to undo anything that has been properly done under the provisions of any of the Acts of Parliament of this country which were in operation at the time the Act of 1890 was passed; it cannot exclude facts, nor annul, except by express words—and there are none—the will of the Legislature as defined by the Idiots Act, 1886, that people in the condition of these two brothers may be lawfully detained in institutions like Earlswood; and without ignoring the provisions of earlier Acts relating to the custody and care of lunatics and idiots it is impossible, in my opinion, to put an interpretation on the expression "lawfully detained," as used in s. 116, sub-s. 1 (*c*), which would limit it entirely to the case of persons "detained" under the Act of 1890. The only difficulty as to the jurisdiction of this Court to make the order now asked for is based upon *In re Watkins* (1); but when that case is examined it will be found that, though there are observations by the Lords Justices apparently narrowing the jurisdiction of this Court to the case of persons "lawfully detained" under the provisions of the Act of 1890, yet that these observations are only dicta uttered alio intuitu which must be confined to the particular case then under consideration, and that the decision does not touch the question now before us. In that case a person of unsound mind, though not so found, was detained as a lunatic in Belgium in accordance with the laws of that country, and the Lords Justices decided that the expression "lawfully detained," as used in s. 116, sub-s. 1 (*c*), meant lawfully detained under the provisions of the Lunacy Act, 1890, and did not apply to an Englishman detained in a foreign country in accordance with the laws of that country. The point there was one solely whether this Court had jurisdiction to deal with the case of a person detained out of England by the laws of a foreign country—in other words, whether it could

(1) [1896] 2 Ch. 336.

regard a person lawfully detained in a foreign country as lawfully detained by the law of England, and it came to the conclusion it could not. That was all that was necessary for that decision and all that was intended to be embraced by it. The attention of the Court in *In re Watkins* (1) was not called to any of the earlier enactments as to lunatics, or to the Idiots Act, 1886, for it was not necessary in the circumstances of that case to do so, as the Court was only dealing with a person lawfully detained in accordance with the laws of a foreign country as contrasted with a person lawfully detained under the law of this country; and the Court came to the conclusion on the facts of that case, and not remembering the Idiots Act, 1886, which had not been cited to them, that the case then before them was not covered by s. 116, sub-s. 1 (*c*). If the learned Lords Justices had been referred to the Idiots Act of 1886 they would probably all have used language to express—as, indeed, Lindley L.J. did (2)—that "lawfully detained as a lunatic" meant lawfully detained under the provisions of the Acts of Parliament of this country; but not having had that Act drawn to their attention, they made observations which seem to confine the jurisdiction to detention under the Act of 1890. It seems to me, therefore, that the point raised by the lunacy officials, though well worth discussing, is not affected by *In re Watkins* (1), which is no decision on the question which is now before us. When the matter is looked into, that case is plainly distinguishable from the present. I have no doubt at all about it that in a case like the present the Court has jurisdiction to make an order for the appointment of a committee of these estates as asked for by these summonses.

Romer L.J. I agree.

Cozens-Hardy L.J. I also agree, and I have very little to add. In my opinion it is unfair to treat the observations of Lindley and Lopes L.JJ. in *In re Watkins* (1) as finally deciding that the expression used in s. 116, sub-s. 1 (*c*), "lawfully detained as a lunatic though not so found by inquisition" must be confined to

(1) [1896] 2 Ch. 336. (2) [1896] 2 Ch. 337.

C. A. 1906 MARK WHALLEY, *In re*, AND W. R. WHALLEY, *In re*. Cozens-Hardy L.J.

detention under the Act of 1890. The provisions of the Idiots Act, 1886, were not mentioned to the Court in *In re Watkins* (1), and for very good reason, because they were not relevant to the particular facts of that case. I observe that s. 340, sub-s. 2, of the Lunacy Act, 1890, provides that that Act is not to affect the provisions of the Idiots Act, 1886. In my opinion the true meaning of the expression "lawfully detained as a lunatic though not so found," as used in s. 116, sub-s. 1 (*c*), is "lawfully detained" under the provisions of the Acts of Parliament of this country. In my opinion, therefore, we have jurisdiction to make the order now asked for.

Solicitors: *Bolton & Co.*

W. C. D.

C. A. 1906 *March* 1.

In re EDWARDS. JONES *v.* JONES.

[1905 E. 251.]

Will—Construction—Gift to a Class who attain Twenty-one—Contingent or vested—Gift over on Death "without leaving any Children"—Child surviving and dying under Twenty-one—Intestacy.

A testatrix gave all her real and personal estate to trustees in trust for her children who attained twenty-one or married, and if more than one in equal shares, with a gift over to other persons in the event of her death "without leaving any children surviving me." There was one child, who survived the testatrix and died an infant:—

Held, reversing the decision of Buckley J., that the child did not take a vested interest at birth; and, secondly, that the gift over did not take effect, and that there was an intestacy.

Per Romer L.J.: The observations of Malins V.-C. in *Kidman* v. *Kidman*, (1871) 40 L. J. (Ch.) 359, 360, that, in a case like the above, words referring to death "without any children" are equivalent to "without any such children" are founded on a misapprehension of the decision in *In re Wrangham's Trust*, (1860) 1 Dr. & Sm. 358, and cannot be supported.

Walker v. *Mower*, (1852) 16 Beav. 365, approved.

APPEAL from a decision of Buckley J. on a question as to the construction of the will of Mrs. Jessie Elizabeth Edwards, the

(1) [1896] 2 Ch. 336.

point being whether a gift of all her property to her children was vested at birth or contingent on their attaining twenty-one.

The will and the facts, so far as material for the purposes of this report, were as follows:—

The testatrix by her will dated December 20, 1902, in paragraphs, after appointing her husband and her eldest brother, Peter Evan Jones, executors and trustees, proceeded as follows:—

"3. I give all my property, both real and personal, to my trustees in trust for my children or child who being sons shall attain the age of twenty-one years or being daughters shall attain that age or marry, and if more than one in equal shares as tenants in common."

"4. In the event of my death without leaving any children surviving me, I give all my property between my brothers and sisters, namely, Peter Evan Jones, William Thomas Jones, Margaret Sarah Jones, and Agnes Ada Luff, in equal shares as tenants in common."

On February 22, 1904, the testatrix died in childbirth, leaving a son who survived his mother only a few hours.

The testatrix died possessed of considerable real and personal estate, and an originating summons was taken out by her executors for the opinion of the Court on several matters arising in the administration of her estate.

On the question of the construction of clauses 3 and 4, Buckley J. decided that, having regard to the gift over in clause 4, the infant took a vested interest, and that the husband accordingly became entitled as on the intestacy of the child.

From this decision the eldest brother of the testatrix, in his capacity as her heir-at-law, appealed.

Buckmaster, K.C., and *Cruickshank*, for the appellant, after stating the will and the facts, and referring to *In re Bevan's Trusts* (1), on which Buckley J. decided this question, were stopped.

J. W. Greig, for the brothers and sisters of the testatrix. The gift under clause 3 was contingent on the children attaining twenty-one or marrying, and in order to make the

(1) (1887) 34 Ch. D. 716.

C. A. 1906

EDWARDS, *In re.* JONES *v.* JONES.

gift over consistent, the words in clause 4, "without having any children surviving me," must be read as equivalent to "without leaving any such children surviving me," as was suggested by Malins V.-C. in *Kidman* v. *Kidman* (1), following *In re Wrangham's Trust.* (2)

[ROMER L.J. *Kidman* v. *Kidman* (1) at first sight does seem to be an authority directly in favour of your contention.]

If clause 4 is read as a gift over in the event of there being no children who attain a vested interest under clause 3, then the whole will is consistent, and there is no intestacy, and the gift to the brothers and sisters takes effect. The Court always leans against an intestacy if possible.

Astbury, K.C., and *P. Wheeler*, for the husband, as the heir-at-law and next-of-kin of the infant child. Reading clauses 3 and 4 together the true construction is that the child took a vested interest at birth. A gift over, like the one in clause 4, has been held to shew an intention that the children, if any, should take, although not attaining twenty-one or marrying: *Leake* v. *Robinson* (3); *Ingram* v. *Suckling* (4); Hawkins on Wills, pp. 223, 225; *Bree* v. *Perfect.* (5)

[ROMER L.J. *Bree* v. *Perfect* (5) has not been accepted as correct lately.]

The gift in clause 3 is made clearer by the light thrown on it by clause 4, and on this point we submit that Buckley J. came to a right conclusion. If clauses 3 and 4 are to be taken independently, there is no justification for reading "leaving any children" as meaning "leaving any such children." If the clause is read strictly, the event contemplated has not happened, and consequently there is no gift to the brothers and sisters. In this case there is an intestacy.

COLLINS M.R. Romer L.J. will deliver judgment first in this case.

ROMER L.J. On the first point involved in this appeal—namely, whether the gift in clause 3 of the will was or was not

(1) 40 L. J. (Ch.) 359.
(2) 1 Dr. & Sm. 358.
(3) (1817) 2 Mer. 363, 386.
(4) (1859) 7 W. R. 386.
(5) (1844) 1 Coll. 128.

contingent—I cannot say that I feel any doubt whatever. The words are perfectly clear: there is no possible ambiguity about them. [His Lordship read clause 3, and continued:—] The very essence of the gift is that only those children shall take who being sons attain twenty-one, or being daughters attain that age or marry. No other gift is contemplated. Then, when I come to clause 4, how can that be said to throw any light on the preceding gift, or to make that ambiguous which was perfectly clear? [Having read clause 4, his Lordship continued:—]

That, in my opinion, casts no light on the preceding gift, which was clear: it does not make that ambiguous which was clear before, and the words in both clauses are, as I have shewn, perfectly clear, simple, and free from doubt. There have been cases, no doubt, where you have had, first, a gift in language which is not perfectly clear (or which might be held, in certain cases, to be not perfectly clear), whether it was intended to make a gift to a class contingent or not. A gift to children "as and when they shall attain twenty-one," though prima facie meaning a gift to children contingently upon their attaining twenty-one, may be said to be words of a character that might have light thrown upon them by the words of a gift over on the parent dying without leaving any children, though, speaking for myself, I think, at the present time, the decision in *In re Wrangham's Trust* (1), followed as it was, and, I think, rightly followed on this part of the case, in *Kidman* v. *Kidman* (2) by Malins V.-C., accurately represents the law even as to those cases, though there are, no doubt, earlier authorities, and there may be one or two since, which conflict with that view. Speaking for myself, I think that, even where you have words such as those I have indicated, which prima facie import contingency, though they are somewhat ambiguous, you will not turn them into non-contingent words, and make gifts to the children vest at birth, merely because you have a gift over on the parent dying without children or without issue. But whether those authorities are in doubt at the present day or not, they would not, to my mind, apply to the will before us. For the reasons I have given, I therefore think that the decision of

(1) 1 Dr. & Sm. 358. (2) 40 L. J. (Ch.) 359.

C. A. 1906

EDWARDS, *In re.* JONES v. JONES.

Romer L.J.

the learned judge in this case, on the main part of the will, was erroneous and should be reversed.

Then comes the second point, about which the authorities are not quite so clear—that is to say, whether, in the gift over in the will before us, in the event of the death of the testatrix "without leaving any children surviving" her, we ought to read the words as meaning "without leaving any such children surviving" her, and so make it into a gift over to the brothers and sisters in case there was no child of the testatrix who attained a vested interest under the prior gift. As to that, speaking for myself, I am strongly of opinion that when you have clear words used by a testator, those words ought to be adhered to, unless there is something in the context which shews that a contrary effect ought to be given. I find here clear words. The words are, "in the event of my death without leaving any children surviving me." Those words are free from ambiguity, and I see nothing in this will which would enable me to say that those words ought not to be adhered to. It is said that the Court leans against an intestacy. I do not know whether that expression at the present day means anything more than this, that in cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view to avoiding intestacy, you are to do otherwise than construe plain words according to their plain meaning. A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will. Therefore, unless I were forced by authority in the present case to hold otherwise, I should hold that the words "without leaving any children surviving me" mean what they say.

Now, do the authorities compel us to hold the contrary? I think not. I need only refer to a few. As far as I can find, the only authority in support of the view that the words are not to have their literal meaning here is that of *Kidman* v. *Kidman* (1), a decision of Malins V.-C. In giving that decision the Vice-Chancellor based his decision on what he appears to have thought had been decided by Kindersley V.-C. in *In re Wrangham's*

(1) 40 L. J. (Ch.) 359.

Trust. (1) I turn to *In re Wrangham's Trust* (1), and when I look at it I find that Malins V.-C. has misinterpreted what Kindersley V.-C. said in *In re Wrangham's Trust.* (1) What Kindersley V.-C. really said appears at p. 362 of the report, and he points out that the object of a similar gift there in the will he had to deal with was not what Malins V.-C. thought he meant, but quite the contrary. The words I refer to are these, where Kindersley V.-C. said (2): "The object of that clause" (that is, the gift over) "was to provide for the event of one or more children attaining twenty-one in the life of their mother, and all of them and all her [*sic*] issue predeceasing her." That is to say, he thought the gift over in that case, being a gift over on the lady dying without leaving any issue, meant what it said, without leaving any issue at her death, and, therefore, Malins V.-C. quite misunderstood what Kindersley V.-C. decided, and, in fact, erroneously interpreted Kindersley V.-C.'s real meaning. Kindersley V.-C.'s view was to the opposite effect.

Then I find that in *Walker* v. *Mower* (3) Sir John Romilly M.R. decided the exact point. Incidentally I may say that he decided both the points which arise in this appeal. There there was a gift to A. for life with a provision that after A.'s death the property should be assured equally between A.'s children on their respectively attaining twenty-one, with a gift over on A.'s death without leaving any child. The Master of the Rolls first held that the gift to the children was contingent, and then, with regard to the gift over, he said this (4): "As to the gift over, I am of opinion that it did not take effect, because the tenant for life did not die without 'leaving any child,' the deceased leaving a daughter. There is, therefore, an intestacy, and the moiety of the freeholds go to the heir, and of the leaseholds to the next-of-kin." Therefore, as the authorities stand on the point, we have the Master of the Rolls and Kindersley V.-C. on the one hand, and Malins V.-C. on the other, relying on a misinterpretation of Kindersley V.-C. The effect of the authorities is to support the view I am now expressing, namely, that in the present case the words on which the question

(1) 1 Dr. & Sm. 358.
(2) Ibid. 362.
(3) 16 Beav. 365.
(4) Ibid. 370.

C. A. 1906

EDWARDS, *In re.* JONES *v.* JONES.

Romer L.J.

turns, being plain in meaning, must have due effect given to them.

The only other authority I need refer to is one which has been supplied by my brother Cozens-Hardy, a case of *In re Hamlet.* (1) There the gift over was in this form: There was a gift to a daughter for life, then to her children, like the gift here—that is to say, to sons on attaining twenty-one or daughters on attaining that age or marrying. The gift over was this: "And in case my said daughter Elizabeth Ann shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust moneys, and without leaving any issue them, him or her surviving," then over. The Court of Appeal declined to give to that gift over anything but the effect that ought to be given to it according to its plain words. They said, as Lopes L.J. points out, in a form which summed up the matter, and which I may here cite (2): "If the intention of the testator was that every child of his daughter who attained twenty-one should take a vested interest, absolute and indefeasible, though such child should die in the daughter's lifetime, then, to make the gift over consistent with that intention, it would be necessary to substitute the word 'having' for 'leaving' and to attach no meaning to the words 'her surviving.' This would be doing a violence to the language which nothing would warrant but a clear and unmistakable intention collected from the other parts of the will, and such an intention to my mind is not apparent upon the face of this will." Likewise I say here the words of the gift over of this testatrix in the event of her death "without leaving any children surviving" her are clear, and to depart from them would be doing a violence to the language which nothing can warrant but a clear and unmistakable intention collected from the other parts of the will, and such an intention cannot be gathered from this will. For these reasons I am of opinion that the gift over did not take effect.

COZENS-HARDY L.J. I am of the same opinion. I am quite unable to follow the view of Buckley J. that the child took a

(1) (1888) 39 Ch. D. 426. (2) 39 Ch. D. 442.

vested interest at birth. I cannot imagine a more clear contingent gift than that which is found in clause 3, and, for the reasons which have been stated by Romer L.J., I can find nothing in the context which suffices to turn that which is a clear contingent gift into a gift which would vest in all the children who survived the testatrix, whatever their age might be. I think that a contrary view would be not without danger, having regard to the fact that the form of gift which you find in clause 3 is one of the commonest possible forms in all wills and settlements where parents are giving or settling money on their children—sons at twenty-one and daughters at twenty-one or marriage. I think, therefore, that the infant who survived its mother for only a few hours did not take a vested interest at birth.

On the second point, whether there is an intestacy altogether or whether the gift over which is found in clause 4 is operative, there is, no doubt, rather more difficulty; but I feel myself quite unable to get over the strength of the words "surviving me," and I think the only safe course is to read that clause literally and as it stands. That being so, the event has not happened on which, and on which alone, anything is given to the testatrix's brothers and sisters. The result is that the declaration of the learned judge should be reversed, and it must be declared that there was an intestacy.

COLLINS M.R. I entirely concur in the judgments which have been delivered.

Solicitors: *Schultz & Son, for Gwilym James, Charles & Davies, Merthyr Tydfil; Frederick Kinch, for Lloyd & Pratt, Cardiff.*

W. C. D.

C. A.
1906
March 7.

In re DUNSANY'S SETTLEMENT.
NOTT *v.* DUNSANY.

[1905 D. 460.]

Marriage Settlement — Covenant to settle Wife's after-acquired Property — Construction—Estate Tail.

By a marriage settlement the intended husband and wife covenanted with the trustees of the settlement, that if during the coverture the wife, or the husband in her right, should become seised or possessed of, or entitled to any real or personal property for any estate or interest in possession, remainder or expectancy, the husband and wife and all other necessary parties would, as soon as circumstances would permit, convey, assign, settle and assure the said real or personal estate to the trustees for the time being of the settlement :—

Held, that an estate tail to which the wife became entitled in remainder during the coverture was not bound by the covenant.

Hilbers v. *Parkinson*, (1883) 25 Ch. D. 200, followed and approved.

Appeal from a decision of Kekewich J.

By a settlement dated April 2, 1877, made in contemplation of the marriage of the defendant to the Hon. John William Plunkett (afterwards Lord Dunsany), the said J. W. Plunkett and the defendant covenanted with the trustees of the settlement that if during the intended coverture the defendant or the said J. W. Plunkett in her right should at one and the same time and from the same source become seised or possessed of or entitled to any real or personal property (subject to certain exceptions not material to the present case, including property settled for her separate use) for any estate or interest in possession, remainder, or expectancy, then and in every such case the said J. W. Plunkett and the defendant and all other necessary parties would, at the cost and charges of the trust estate, as soon as circumstances would permit, and to the satisfaction of the trustees for the time being of the settlement, convey, assign, settle and assure the said real or personal estate unto or otherwise cause the same to be vested in such trustees upon the trusts of the settlement.

The marriage was duly solemnized on April 3, 1877. Lord Dunsany died in 1899.

Under the will dated May 6, 1850, of Maria Caroline Sawbridge Erle Drax, who died on August 18, 1885, the defendant became entitled on the death of the testatrix to certain lands as tenant in tail in remainder, and in 1905 she became entitled thereto as tenant in tail in possession.

This was an originating summons taken out by the existing trustees of the settlement, in effect, to determine whether the defendant was bound under the covenant to convey to the plaintiffs the property to which she was entitled in tail for any and what estate.

Kekewich J. held, on the authority of *Hilbers* v. *Parkinson* (1), that the defendant was not bound to convey the property to the plaintiffs.

The plaintiffs appealed.

E. Beaumont (*Stewart-Smith, K.C.*, with him), for the plaintiffs. I admit that this case is covered by *Hilbers* v. *Parkinson* (1), but I say that that case was wrongly decided and ought to be overruled. It was referred to by Lindley L.J. in *In re Anstis* (2), without criticism, but it has not been generally accepted by the profession.

[COZENS-HARDY L.J. In Norton on Deeds, p. 601, a doubt is expressed as to the correctness of that decision.]

[*Upjohn, K.C. Hilbers* v. *Parkinson* (1) is cited as an authority in the leading text-books on conveyancing: Carson's Real Property Statutes, p. 297; Dart on Vendors and Purchasers, 7th ed. p. 1032; Vaizey on Settlements, p. 238; Underhill & Strahan's Wills and Settlements, p. 253.]

[ROMER L.J. The covenant binds the lady to convey "the said real or personal estate." How can she convey an estate tail?]

"Estate" there does not mean "interest," but is equivalent to "property" in the earlier part of the covenant. On behalf of the lady the argument must go to this, that, although she would be bound to convey an estate for life, yet, having an estate tail, she is bound to convey nothing; but it cannot have been

(1) 25 Ch. D. 200. (2) (1886) 31 Ch. D. 596, 605.

C. A. 1906

DUNSANY'S SETTLEMENT, *In re.*

NOTT *v.* DUNSANY.

intended that an estate tail should be exempted altogether. Regard must be had to the object of the covenant, viz., to exclude the marital right. This is shewn by the language of the exception which expressly excepts from the covenant property settled to the separate use of the lady.

[COZENS-HARDY L.J. In what form could you frame your conveyance?]

I could tender a deed which would only give the trustees an estate for the life of the lady. That is the least that I am entitled to. But I say, further, that the trustees might call upon her by a deed properly enrolled to convey to them the fee simple.

P. O. Lawrence, K.C., *Upjohn, K.C.*, and *Popham*, for the defendant.

COLLINS M.R. The question in this case is whether Lady Dunsany, who during her coverture became entitled to an estate tail, is bound by the terms of a covenant to assign after-acquired property, not to assign her estate tail, because she cannot assign that, but to get as near thereto as possible by assigning an estate for life or by executing a disentailing deed and then assigning the fee. The point has been decided already in the case of *Hilbers* v. *Parkinson* (1); and in fact it is not contested that that case is indistinguishable from the present. Therefore the question for our decision is, whether that case is good law or not. I have heard no reason assigned why it is not good law. The lady has undertaken, it is true, to assign an estate tail, but when Mr. Beaumont is asked how that can be done, he is forced to admit that it is impossible. Then, what obligation is there on her to assign anything else? It was held in *Hilbers* v. *Parkinson* (1), under a similar covenant, that the wife could not be called upon to split up an estate tail and assign an interest for life. That was not the obligation that she undertook. The result is that the obligation that has been undertaken is impossible of execution, and that this lady is not bound to assign. In these circumstances I see no reason for supposing that *Hilbers* v. *Parkinson* (1) was not well decided, and that being so, it is conclusive of this case.

(1) 25 Ch. D. 200.

ROMER L.J. I am of the same opinion. The only point which seems to me to be really involved is this, whether upon the true construction of this covenant, where an estate tail is given to the covenantor, the covenantor can be said to have entered into an obligation to assure the fee simple. In my opinion, upon the true construction of the covenant, that cannot be said. The true construction of the covenant, I think, in this case, as in the case of *Hilbers* v. *Parkinson* (1), is that the covenantor is only bound to assure the lands in which she acquires an interest for the estate given to her and for no higher estate. Then, what is to happen where the covenantor acquires an estate tail in some lands? It is true that the covenantor if she chooses can turn that estate tail into an estate in fee simple. Is that right on her part a right which can be said to have been in any way subject to an obligation of this kind? That is to say, can we construe this covenant as a covenant by her that if she has an estate tail she will do all that is necessary to turn that into an estate in fee simple? I say certainly not. I cannot so interpret the covenant. That being so, what are you to do with the covenant so far as regards the estate tail? You cannot assure an estate tail, and you cannot imagine any form of deed tendered to the covenantor for her execution which she would be bound to execute. The only form which the trustees really want is a form of assurance purporting to convey to them an estate in fee simple. The lady is not bound to do that. She is not bound to execute any deed which purports to convey to the grantee a greater estate than she has. Therefore you cannot make her assure an estate in fee to the trustees. Then what can you do? Can you make her split up the estate tail and say that she must be held to have an estate for life and something more, and that she ought to assure that estate for life? The answer is No, for the reasons given by Pearson J. in *Hilbers* v. *Parkinson* (1), which appears to me to be rightly decided. An estate tail is not made up of an estate for life with remainders over. It is an estate as a whole, and she is not bound to grant a life estate out of it. It appears to me that this covenant is not applicable to the case of an estate

(1) 25 Ch. D. 200.

C. A. 1906 — DUNSANY'S SETTLEMENT, *In re.* — NOTT *v.* DUNSANY. — Romer L.J.

tail. That depends on the true nature of an estate tail. I cannot see why it should be considered that there is anything strange about that. The answer is that an estate tail is a strange estate. It possesses many peculiarities not possessed by either an estate for life or an estate in fee. I may point out this. Take the case of merger. If I give to A. an estate for life with remainder to A. in fee, merger takes place according to the well-known rule of law; but if I give an estate tail to A. with remainder to A. in fee, there is no merger. Why? Because of the peculiarities of an estate tail. So here this covenant cannot apply to an estate tail because of its peculiarities. It appears to me, therefore, as I have said, that *Hilbers* v. *Parkinson* (1) was rightly decided and that this appeal fails.

COZENS-HARDY L.J. I agree. This covenant in short says that if the lady during the coverture acquires land for any estate in possession, remainder or expectancy, then she shall assure the said estate. Now, reading that strictly, that must mean the estate which she has in the land, namely, the estate tail; but treating the word "estate" as though "property" were used there, it seems to me necessarily to involve this: that she is only bound to convey the property for such estate as she has in it, and therefore, whichever way you read it, it is simply a covenant that she will assign her estate tail. I asked the appellants' counsel, who is thoroughly competent to answer the question, if it admitted of an answer, how could that be done. His first answer was, "We will ask her to convey the property to us during her life." But that is not the bargain she has entered into. Then an alternative suggestion was, "We will ask her to convey to us an estate in fee." But she is under no obligation to do that; she has not bargained to do any such thing. *Hilbers* v. *Parkinson* (1) is a case which is perfectly indistinguishable from the present, and it seems to me to have been rightly decided.

Solicitors: *Woodcock Ryland & Parker, for Preston & Francis, Bournemouth.*

(1) 25 Ch. D. 200.

H. B. H.

VILLAR *v.* GILBEY.

C. A. 1906

[1905 V. 133.]

Feb. 9, 12, 13; *March* 8.

Will—Construction—"Born in my Lifetime"—Divesting Clause—Child en ventre sa mère.

The general underlying principle of the long series of decisions on this subject is that for the purposes of devolution of property in connection with intestacies and wills, no distinction ought to be drawn between a child born at a particular time, and a child at that time en ventre sa mère and subsequently born alive; and that with regard to wills they ought to be construed and given effect to without making any such distinction unless the context requires a distinction to be made.

Blasson v. *Blasson*, (1864) 2 D. J. & S. 665, unless founded upon the governing words of the particular will, is opposed to the general current of authority, and can no longer be supported.

A testator devised real estate in strict settlement to the first and second sons of his brother, who were alive at the date of the will, successively for life, with remainder to their first and other sons in tail, with remainder to the third, fourth, and other sons of his said brother successively in tail, but declared his intention to be that any third or other son born in his lifetime should not take a larger interest than an estate for life, with remainder to his issue in tail male. The brother's third son was born three weeks after the testator's death. The first and second sons died without issue:—

Held (reversing the decision of Swinfen Eady J., [1905] 2 Ch. 301), that the third son's estate tail was cut down to an estate for life.

Appeal from a decision of Swinfen Eady J. (1)

The only question raised by this action was, whether on the construction of a devise cutting down estates tail to estates for life in the case of persons born in the lifetime of the testator, the words "born in my lifetime" included a person en ventre sa mère at the date of the testator's death.

The documents and facts on which this question arose were, so far as material, as follows:—

George William Rush, by his will of June 22, 1854, devised his real estate to his brother Alfred Rush for his life, and from and after his decease he devised all the same estates to his said

(1) [1905] 2 Ch. 301.

C. A. 1906 — VILLAR v. GILBEY.

brother's eldest son, his nephew Alfred George Anderson Rush, for his life, and from and after his decease he devised all the same estates unto the first and every other son and sons of the body of the said Alfred George Anderson Rush severally successively and in remainder one after the other according to priority of birth in tail, with remainders over to the daughters of the said Alfred George A. Rush in tail. And in default of such issue, the testator devised all the same estates to his said brother's second son, his nephew George Alfred Gordon Rush, for his life, and from and after his decease the estates were devised to his sons and daughters in tail in precisely similar terms as the devise to the sons and daughters of the eldest nephew; and in default of such issue, the testator devised the same estates "unto the third, fourth, and every other son and sons of the body of my said brother Alfred Rush severally, successively, and in remainder one after another, according to priority of birth, and to the heirs of the body and bodies of such son and sons lawfully issuing, the elder of such son and sons and the heirs of his body being always preferred before a younger son and sons; but I declare my intention to be, that any third or other son or sons of my said brother born in my lifetime shall not take a larger interest in my said estates than for life only, with remainder to his issue in tail male, and then in tail female, in all respects as near as may be as is hereinbefore declared with respect to my said two nephews now living and their issue in tail."

George William Rush, the testator, died on September 18, 1854. Alfred Rush, the testator's brother, had six children—of whom the two eldest were the two sons named in the will; a third son, William Beaumorice Rush, who was born on October 9, 1854, some three weeks after the testator's death; and a fourth son, Joseph Arthur Rush, who was born in May, 1858.

Alfred Rush died in March, 1873.

Alfred George Anderson Rush, his eldest son, died in May, 1879, without ever having had any issue.

In December, 1882, William Beaumorice Rush was adjudicated a bankrupt, and by an indenture of August 1, 1883, his trustee in bankruptcy conveyed the reversionary life interest which he took under the said will to one H. D. Bishop; and on June 12,

1884, H. D. Bishop conveyed to the defendant all his interest under the indenture of August 1, 1883.

The bankruptcy of William Beaumorice Rush was closed by an order of February 23, 1895, and the official receiver thereupon became the trustee of the estate of W. B. Rush.

George Alfred Gordon Rush, the second son, died on November 2, 1903, without ever having had issue.

By an indenture of February 2, 1905, and duly enrolled as a disentailing assurance, the official receiver conveyed the estates so devised by the said will to W. B. Rush to the plaintiff in fee simple.

The defendant was also the purchaser from Joseph Arthur Rush, the fourth son, of the estate tail so devised to him as above stated by the will. In all dealings prior to the disentailing deed, it had been assumed that the estate taken by W. B. Rush under the will was an estate for life only.

The plaintiff, by this action, claimed a declaration that the interest taken by W. B. Rush under the testator's will was an estate tail, and not an estate for life.

Swinfen Eady J. held that the words "born in my lifetime" must be taken in their literal sense, and that the estate tail devised to the third son was not cut down to an estate for life.

The defendant appealed.

Warmington, K.C., *Micklem, K.C.*, and *H. Wace*, for the appellant. It is laid down in Jarman on Wills, 5th ed. p. 1041, that "for all purposes of construction, a child en ventre sa mère is considered as a child in esse [if it will be for its own benefit to be so considered]." This is said to have been finally established by *Doe* v. *Clarke*. (1) This rule of construction is not limited to cases of perpetuity or ascertaining a class or to cases where it is for the benefit of the child. According to the later authorities the benefit of the child is immaterial. In *Doe* v. *Lancashire* (2), the point was whether a will made before marriage by a testator who died leaving his wife pregnant of a child which was afterwards born was or was not revoked, and it was held that the will was revoked by the subsequent birth of the child; the child

(1) (1795) 2 H. Bl. 399. (2) (1792) 5 T. R. 49.

C. A. 1906 VILLAR v. GILBEY.

"being considered by retrospect as born during the parent's life." *Wallis* v. *Hodson* (1) lays it down that both by the rules of common and civil law a child en ventre sa mère is in rerum natura as much one as if born in its father's lifetime; *Trower* v. *Butts* (2) is another decision to the same effect. In *In re Burrows* (3) the same rule was given effect to though the posthumous child took no interest or benefit. In *In re Wilmer's Trusts* (4), Buckley J., applying the doctrine of *Doe* v. *Lancashire* (5), held the rule to be applicable in all cases, and the doctrine to be one of general application, whether it is for the benefit of the child or immaterial to him, or to his actual disadvantage; and this decision was approved on appeal. (6) The judge in the Court below has misapprehended the strength of this rule of construction. The authorities shew that in a will like the present, with limitations in the words therein contained, W. B. Rush must be deemed to have been born in the testator's lifetime. This rule of construction has been laid down to effectuate the intention of the instruments under consideration. The intention in this case is clear, viz., that no one to whom an estate tail has been given who is born in the testator's lifetime is to take anything more than a life estate. It is not a devise of an estate tail to the third son, followed by a divesting clause, but an alternative gift—i.e., for life if born in the testator's lifetime, if not born in the testator's lifetime, and only in that event, an estate tail; and according to the authorities this third son must be deemed to have been born in the lifetime of the testator. *Blasson* v. *Blasson* (7) is inconsistent with the authorities: it was not followed in *In re Wilmer's Trusts* (4) nor in *Pearce* v. *Carrington* (8); if it is to be supported at all, it can only be on the particular words of that will, which were "born and living." Kindersley V.-C., in *Blasson* v. *Blasson* (9), took the view we now contend for, but he was overruled.

[COZENS-HARDY L.J. referred to the report of the case in

(1) (1740) 2 Atk. 114, 117.
(2) (1823) 1 S. & S. 181.
(3) [1895] 2 Ch. 497.
(4) [1903] 1 Ch. 874.
(5) 5 T. R. 49.
(6) [1903] 2 Ch. 411.
(7) 2 D. J. & S. 665.
(8) (1873) L. R. 8 Ch. 969.
(9) (1864) 12 W. R. 396.

W. R. (1) to shew that *Doe* v. *Clarke* (2) and *Doe* v. *Lancashire* (3) were cited.]

The whole of our argument depends on the point that the words "born in the lifetime" are descriptive of the person who is to take.

[ROMER L.J. I see that the Thellusson Act (39 & 40 Geo. 3, c. 98), s. 1, uses the words "during the minority of any person who shall be living, or en ventre sa mère," at the time of the death of the grantor or testator.]

Conveyancers have always assumed that a clause of this sort would include a son en ventre sa mère: Powell on Devises, 3rd ed. vol. ii. pp. 325, 326; Hayes & Jarman's Conveyancing (Forms of Wills), 1860 ed. p. 189; Davidson's Conveyancing, 2nd ed. vol. iv. (Wills), p. 334; 3rd ed. p. 392. The note in the last edition states that after *Blasson* v. *Blasson* (4) the proviso was probably superfluous. So that at the date when this will was drawn it was considered reasonably clear that the word "born" included a child en ventre sa mère.

Eve, K.C., and *R. J. Parker*, for the respondent. We admit that in many cases, e.g., in questions of perpetuity, or in ascertaining a class, the Court considers that a child en ventre sa mère is a child in being; but that rule is an artificial one, and does not apply to a case of mere construction. This rule of construction prevails only where it makes the unborn child the object of a gift, or prevents an estate from being divested. In this case the testator has given a vested interest to the third son, and why should it be divested by an artificial construction put upon words which in ordinary language are quite plain? The appellant's counsel insist that there is a general rule applicable in all cases that the word "born" includes a child en ventre sa mère. We say that there is no such rule of universal application, either of law or of construction.

[ROMER L.J. If there is not some such general rule, it is very difficult to reconcile all these cases.]

Doe v. *Lancashire* (3) was only a restatement of the old common law rule, it was not a question there of intention at all. *In re*

(1) (1864) 13 W. R. 113.
(2) 2 H. Bl. 399.
(3) 5 T. R. 49.
(4) 2 D. J. & S. 665.

C. A. 1906 VILLAR v. GILBEY.

Wilmer's Trusts (1) was not a question of construction. In both those cases it was purely a question as to the rule of law: here there is a question of construction. Once get rid of *Doe* v. *Lancashire* (2) and *In re Wilmer's Trusts* (1) and there remain only the cases on construction.

[ROMER L.J. referred to *Long* v. *Blackall* (3).]

Cases which interpreted the rule must not be treated as stating what the rule is. The rule has existed for years, but it has been restated more accurately in succeeding cases. The onus does not lie on the respondents to state a rule that will reconcile all these cases, and there is no need to bring in canons of construction to explain words which have a plain and ordinary meaning.

[COZENS-HARDY L.J. Why should not this be read as an alternative gift?]

It is really a "cutting-down clause," that is, a clause cutting down the estate tail to a life estate, and so it is called in the conveyancing books. But even if it is regarded as an alternative gift, there is no reason why the actual literal meaning of the words should not be followed. Two forms of gift were at one time in use: one to children "born in my lifetime," and the other to children "born in due time afterwards." But the latter form was afterwards dropped, as it was found not desirable to make gifts to posthumous children for the reason given in Bythewood & Jarman's Conveyancing, 3rd ed. (1849) vol. xi. p. 328, because this would in every case involve an inquiry as to the time of conception. Accordingly the only form now used is "born in my lifetime": Davidson, 3rd ed. vol. iv. pp. 391—2, note (*f*). Sometimes, for greater certainty, the word "actually" is introduced. In *Trower* v. *Butts* (4) a posthumous child was let in because its potential existence was within the reason and motive of the gift. No invariable rule was laid down in that case, and the decision rested really on the circumstances. When a testator cuts down his gift to children "born in my lifetime," there is no good reason for departing from the ordinary meaning of the words—the meaning which a testator would naturally

(1) [1903] 1 Ch. 874.
(2) 5 T. R. 49.
(3) (1797) 7 T. R. 100.
(4) 1 S. & S. 181.

attribute to them. In *Thellusson* v. *Woodford* (1) the words were "born in due time afterwards"—words which do not occur here. No doubt there are cases in which you can treat a child as "born" though en ventre sa mère: for instance, where such a construction is necessary to prevent the divesting of a share under a divesting clause; so also, where there is a devise to A. in fee, and if he dies under twenty-one "and" without issue, then over, "and" is read "or." Illustrations of this construction are to be found in Theobald on Wills, 6th ed. p. 674. The Courts always favour vesting at the earliest moment, and discountenance divesting clauses, unless they are perfectly satisfied that the divesting event has happened. Similarly, "leaving" is read as "having," upon the principle that a vested interest shall not be taken away by ambiguous words. But we submit that there is no rule of law compelling the Court to depart from the natural meaning of the words "born in my lifetime," and therefore they should be construed in their natural sense.

Micklem, K.C., in reply. I submit that there is really an alternative gift here. There is an original gift for life to a son if "born in my lifetime," but if a son is born afterwards then he takes an estate tail. It is a misapprehension to suppose that the expression "born in my lifetime" is used to exclude a child en ventre sa mère. This is contrary to the universal opinion of conveyancers, for when they use those words they assume that they include a child en ventre sa mère, and so add, when thought desirable, a proviso excluding such a child: Powell on Devises, 3rd ed. vol. ii. pp. 324 (note), 325; Davidson's Conveyancing, 2nd ed. vol. iv. p. 334; Key & Elphinstone's Conveyancing, 8th ed. vol. ii. pp. 812—3; Bythewood & Jarman's Conveyancing, ed. 1834, vol. x. p. 188; the note to which is repeated in 3rd ed. (1849), vol. xi. p. 328, and in 4th ed. vol. vii. p. 625.

[*R. J. Parker.* The statement in the last-mentioned work must be taken as qualified since *Blasson* v. *Blasson* (2), where it was held that the construction that a child en ventre sa mère is to be considered as a child in esse is only applicable where such construction is necessary for the benefit of that child.]

(1) (1798) 4 Ves. 227, 321. (2) 2 D. J. & S. 665.

C. A. 1906 VILLAR v. GILBEY.

The view of the conveyancers agrees with all the authorities: *Richards* v. *Richards* (1); *Clarke* v. *Blake* (2); *Thellusson* v. *Woodford*. (3) In short, the rule of law is that a child en ventre sa mère is to be considered for all purposes as a child in esse, except in a case of descent, at common law.

[ROMER L.J. Not "for all purposes." For instance, as Vaughan Williams L.J. pointed out in *In re Wilmer's Trusts* (4), such a child cannot be murdered.

COZENS-HARDY L.J. A case of *Beale* v. *Beale* (5), referred to in *Clarke* v. *Blake* (2), says the contrary.]

The intention of the testator here was to tie up the property in the Rush family as long as the rules of law would permit, and I submit that effect should be given to that intention by adopting what must be now considered as the recognized construction of the words "born in my lifetime."

Cur. adv. vult.

March 8. ROMER, L.J. A long series of cases has established that, for purposes of succession to property on an intestacy and for many purposes connected with wills and their construction, a child en ventre sa mère at a particular time, who is subsequently born alive, is to be considered as "living" or "born" at that time. The following are examples:—If the owner of an estate in fee simple dies intestate and there is a child en ventre sa mère at the date of the death who, if then born, would be heir, and that child is subsequently born alive, that child succeeds as heir; although in this particular case, owing to the exigencies of the common law requiring a tenant to the præcipe, the child would not be entitled to the rents of the estate between the death of the intestate and the birth: *Richards* v. *Richards*. (1) In the case of intestacy as to personal estate, a child en ventre sa mère, subsequently born alive, shares as if living at the date of the death of the intestate: *Wallis* v. *Hodson*. (6) In case of a will, in the absence of any context negativing that view, under a gift to the children of A. "living" at a particular time: *Doe* v.

(1) (1860) Joh. 754.
(2) (1788) 2 Bro. C. C. 320, note (1).
(3) 4 Ves. 321-2, 335.
(4) [1903] 2 Ch. 419.
(5) (1713) 1 P. Wms. 244, 246.
(6) 2 Atk. 114.

Clarke (1), or "born" at such time: *Trower* v. *Butts* (2), a child of A., en ventre sa mère at that time, and subsequently born alive, shares; and views to the contrary that had been expressed by some judges (and in particular by Kenyon M.R.) are unsound. The reason was pithily put by Leach V.-C. in *Trower* v. *Butts* (2) thus—"because the potential existence of such a child places it plainly within the reason and motive of the gift," a reason which may well be applied to the provision in the will in the present case on which the question before us turns. Nor is the rule limited to cases where the gift is for the benefit of the child itself: see *Pearce* v. *Carrington* (3) and *In re Burrows*. (4) In *Doe* v. *Lancashire* (5) it was decided under the old law that marriage and the birth of a posthumous child revoked a will made before marriage. Again, it has long been held, with regard to questions of perpetuity under a will, that a child en ventre sa mère at the time of the testator's death, who is subsequently born alive, must be treated as having been alive at the testator's death: see *In re Wilmer's Trusts* (6) and cases there cited. In addition to these cases I may refer to what was said by Buller J. with reference to the recognition by the law of a child en ventre sa mère in *Thellusson* v. *Woodford* (7): "He may be vouched to a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." And in the Thellusson Act the Legislature was careful with regard to accumulation by will from the death of the testator during minority, to provide that it might be during minority of any person "living or en ventre sa mère" at the death of the testator.

The question now arises what conclusion ought to be drawn from the very varied circumstances pointed out above in which a child en ventre sa mère at a given time and

(1) 2 H. Bl. 399.
(2) 1 S. & S. 184.
(3) L. R. 8 Ch. 969.
(4) [1895] 2 Ch. 497.
(5) 5 T. R. 49.
(6) [1903] 2 Ch. 411.
(7) 4 Ves. 322.

C. A. 1906 VILLAR v. GILBEY. Romer L.J.

subsequently born alive has been treated as if born at that time. Are these varied circumstances to be treated as having given rise to decisions only establishing several isolated and different rules governed by no common principle; or is there not some general underlying principle to account for the varied decisions? It appears to me impossible to suppose that there is no such general underlying principle. It cannot be said that the principle is limited to cases in which the benefit of the child is concerned. The modern authorities are opposed to that limitation, and, indeed, so are some of the older authorities. For example, I take it that the decisions establishing that a will is revoked by marriage and the birth of a posthumous child would be applicable even if the person benefited by the revocation were the widow and not the child, as might be the case. What, then, is the general underlying principle? The full extent of it may be matter of doubt. But I am driven to the conclusion, from a consideration of the many varied circumstances I have referred to above, that the principle at any rate goes to this extent—that prima facie, in the absence of sufficiently weighty considerations to the contrary, for the purposes of devolution of property in connection with intestacies or wills, no distinction ought to be drawn between a child born at a particular time and a child at that time en ventre sa mère and subsequently born alive. In particular, I think, with regard to wills, that they ought to be construed and given effect to without making any such distinction, unless the context requires a distinction to be made. The only case which appears to militate against this view is that of *Blasson* v. *Blasson* (1), a decision of Lord Westbury L.C. That decision, amongst modern cases, stands alone and opposed to the general current of authority in drawing the distinction I have been dealing with, unless the judgment be founded on the special governing words in the will of the testatrix there dealt with, those words being, "children . . . born and living at the time of my decease." It may be—and as to this I need not express any opinion—that those words draw a distinction between "born" and "living," and required a child not only to be "living" in the sense of being en ventre sa mère at

(1) 2 D. J. & S. 665, 670.

the testatrix's death, but also required the child to be then "born." But unless that view be taken of the case, I think it is not binding upon us and ought not to be followed. For not only is it opposed in principle to the general current of authority, as I have pointed out, but Lord Westbury bases his decision on the ground that "the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to." That ground, as the authorities shew, is unsound. The "indulgence of the law" is not so limited. I may add that Lord Westbury's decision was generally regarded as having unsettled previously settled law. This appears from several of the recognized text-books of authority. Take, for example, Jarman on Wills. Prior to *Blasson* v. *Blasson* (1), it was stated in editions of that work that "for all purposes of construction, a child en ventre sa mère is considered as a child in esse." But after Lord Westbury's decision these words had to be added in brackets in the subsequent editions, "[if it will be for its own benefit to be so considered]": see the 4th ed. vol. ii. p. 185. That being so, it appears to me that the principle I have indicated affecting the construction and effect of wills ought to be applied in the present case, unless there is something in the will, taken as a whole, to negative its application. Not only do I not find in the will now in question anything to negative the application of the principle, but it appears to me that not to apply the principle would be to refuse to carry out the object of the testator to be gathered from his will, which appears to me to have been to settle his lands as strictly as the law would permit him. I cannot attach weight to the argument of the respondent's counsel founded on the difficulty that might arise in some cases of proving the time of conception of a child. That difficulty existed in most of the numerous cases to which I have called attention. For these reasons I think the appeal should be allowed.

Cozens-Hardy L.J., after stating the nature of the question now raised, the limitations of the will of George William Rush,

(1) 2 D. J. & S. 665.

C. A. 1906 VILLAR v. GILBEY. Cozens-Hardy L.J.

and the facts, continued:—It is perfectly settled law that for many purposes a child en ventre sa mère is deemed to be in the same position as if actually born. For example, such a child takes real estate as heir-at-law, although, for reasons connected with feudal tenure, he is not entitled to the rents and profits until his actual birth. He takes personal property under the Statute of Distributions as a child. At common law he might be vouched in a common recovery: *Wallis* v. *Hodson.* (1) In equity, a bill might be filed on his behalf, and Sir Orlando Bridgeman granted an injunction to restrain waste in such a case: *Lutterel's Case*, cited in *Hale* v. *Hale.* (2) He can take by devise or bequest. It was held more than 200 years ago, in *Hale* v. *Hale* (2), that under a trust for such child or children of A. as should be "living at A.'s death," a posthumous child was entitled. The same doctrine was applied in *Trower* v. *Butts* (3), where the words were "born in A.'s lifetime." In short, it cannot now be questioned that under a devise or bequest to the child of X., or to children of X. as a class living or born at a particular time, a child en ventre sa mère at the time and afterwards born alive is a child entitled under the devise or bequest.

There was at one time a view that this doctrine only applied where it would be for the benefit of the child himself that he should be considered a child in esse. That was the doctrine of the civil law; but I think it is now settled by authority which binds us that this limitation can no longer be maintained: *Pearce* v. *Carrington* (4); *In re Burrows* (5); *In re Wilmer's Trusts.* (6) Indeed, the contrary was scarcely contended for by counsel for the respondent.

There is not, so far as I am aware, any modern decision adverse to this view, unless it is *Blasson* v. *Blasson* (7), where Lord Westbury spoke of "this peculiar rule of construction which is limited to cases where such construction of the word 'born' is necessary for the benefit of the unborn child." That case may possibly be supported on the ground that the words

(1) 2 Atk. 117.
(2) (1692) Prec. Ch. 50.
(3) 1 S. & S. 181.
(4) L. R. 8 Ch. 969.
(5) [1895] 2 Ch. 497.
(6) [1903] 1 Ch. 874; [1903] 2 Ch. 411.
(7) 2 D. J. & S. 671.

there were "who shall have been born and living at the time of my decease," such words possibly indicating a sufficient contrary intention to take the case out of the general rule. Unless it can be so supported, I think that case ought not to be followed.

It has been argued that this doctrine or rule of law ought to be limited to the particular cases which have been decided, although those cases are very numerous and cover almost every conceivable state of circumstances. I cannot assent to this argument: I think that, as a general rule of construction, the word "child" living at or born at a particular date includes a posthumous child, in the absence of any context indicating a contrary intention, and I desire to base my judgment in favour of the appellant on that broad principle.

The clause under which the question arises is commonly found in wills settling real estate, and if there were any proof of a general opinion on the part of conveyancers adverse to the view I have expressed, I should attach great weight to it. But the precedents referred to by Mr. Micklem satisfy me that the opinion of conveyancers has been and is that a posthumous child is included in a clause of this nature, unless words are added expressly to exclude him.

I am not sure that in this particular will the same conclusion might not be reached on somewhat narrower grounds. The will shews an intention to tie up the property as far as the law allows. Moreover, it is not the case of a vested estate tail with a subsequent clause of defeasance. The nephew took, as from the testator's death, either an indefeasible estate tail or an estate for life; and in the event which happened, the alternative second gift took effect, in accordance with established authorities to which I have referred.

The result is that in my opinion, this appeal must be allowed.

COLLINS M.R. I entirely concur in the judgments that have been delivered.

Solicitors: *Baileys, Shaw & Gillett: Reed & Reed, for Reed & Co., Taunton.*

W. C. D.

FARWELL J.

1906

Feb. 16.

QUINION *v.* HORNE.

[1905 Q. 2332.]

Vendor and Purchaser—Conditions of Sale—Requisition on Title—Vendor "unwilling to remove or comply with"—Arbitrary exercise of Power to rescind Contract—Specific Performance.

Freeholds were put up for sale by auction subject to conditions which stated that the vendor was a trustee for sale, and that if any purchaser should make any objection or requisition which the vendor should be "unwilling to remove or comply with," the vendor might annul the sale. The abstract of title supplied to a purchaser shewed that the property was devised by the will of a testator, who died in 1858, upon trust for A. for life, and after her death upon trust for sale and division amongst her children, but if A. died without leaving a child the property was to be conveyed to B. and C. as tenants in common. In answer to the purchaser's requisitions the vendor gave the date and place of A.'s marriage and the names, but not the addresses, of her children. The purchaser pressed for the date of birth of any one child of A. living at her death in order to obtain a certificate of birth to prove that the trust for sale had arisen. The vendor not having this information in his possession, although he knew the address of one child and the address of the solicitors who acted for the other children, declined for reasons stated to comply with the requisition, and rescinded the contract. In an action by the purchaser for specific performance:—

Held, that the requisition was reasonable, that under the circumstances the vendor's rescission was arbitrary and unreasonable, and therefore the purchaser was entitled to specific performance.

ACTION.

On October 11, 1905, freeholds were put up for sale by public auction in lots, subject to conditions of sale which stated (condition 6) that the vendor was trustee of the will of Joseph Sexton, deceased, and was selling under a trust for sale contained in the will; and the 11th condition provided: "If any purchaser shall make any objection or requisition either as to title, the form of the conveyance or other assurance to the purchaser, or any matter appearing in the particulars, conditions, or abstract, or otherwise, which the vendor shall be unable or unwilling to remove or comply with, the vendor shall (notwithstanding any previous negotiation or litigation or attempt to remove or comply with

the same) be at liberty to annul the sale, in which case the sale shall be annulled, such purchaser being in that event entitled to a return of his deposit, but without interest, costs of investigating title, or any compensation or payment whatever, and he shall return the abstract of title or any other papers in his possession received from the vendor or his solicitor." At the sale the plaintiff was the highest bidder for and was declared the purchaser of lot 4 and paid a deposit, and the usual memorandum of agreement was signed by or on behalf of both parties.

The abstract of title furnished by the vendor to the purchaser's solicitors shewed that the testator, Joseph Sexton, died in August, 1858, having by his will, dated July 27, 1858, devised lot 4 and other property to trustees upon trust to pay the rents and profits thereof to his niece M. A. S. Knevett (a spinster) during her life, and after her death upon trust to sell the same property and to stand possessed of the net moneys thence arising in trust for the child or children of M. A. S. Knevett living at her death who should have attained or should attain the age of twenty-one years in equal shares if more than one; but if M. A. S. Knevett should die without leaving a child, then upon trust after her decease to convey the property to her two brothers as tenants in common. The abstract also shewed that the vendor had been appointed a new trustee of the will by a deed dated February 3, 1899, and was now the sole trustee thereof. The following requisitions, amongst others, were made by Messrs. Garner & Sons, the purchaser's solicitors:—

2. When did M. A. S. Knevett die?

3. What children survived M. A. S. Knevett, and what are their names and addresses?

4. When and where was M. A. S. Knevett married?

Mr. Peake, the vendor's solicitor, replied as follows:—

2. M. A. S. Knevett, who married William Wells, died on May 23, 1905.

3. Mrs. Wells left six children her surviving.

4. This information is not in the vendor's possession, but can be obtained, if required, at the purchaser's expense.

Messrs. Garner & Sons pressed for a further answer to the

FARWELL J. 1906 QUINION v. HORNE.

3rd and 4th requisitions, and Mr. Peake on October 28 wrote in reply, giving the date and place of the marriage and the names of the six children, but not their addresses. Thereupon a correspondence passed between the solicitors, as quoted in full in the judgment and shortly stated in the head-note above. The vendor's solicitor refused to comply with the requisition and purported to rescind the sale. The purchaser's solicitors then waived the requisition, but the vendor insisted on rescinding.

Thereupon the purchaser brought this action, claiming—(1.) a declaration that the defendant was not entitled, under the circumstances, to rescind the contract; and (2.) specific performance of the same. The statement of claim also alleged that the defendant acted mala fide, but the plaintiff failed to substantiate this charge at the trial.

The vendor in his statement of defence alleged that neither he nor his solicitor had in their possession any information as to the date and place of birth of any of Mrs. Wells' children, and such information could not have been obtained without trouble or expense; that the information asked for was not necessary, nor would it have been effectual to complete the plaintiff's title; and that he rescinded the contract for sale bona fide in order to avoid trouble and expense, and because he considered the plaintiff's requisition vexatious and unreasonable.

It appeared from the defendant's evidence that his instructions from the beneficiaries prior to the sale were to avoid all unnecessary expense; that he rescinded the contract on the advice of his solicitor, Mr. Peake, and honestly believed it was the best thing to do. It also appeared from Mr. Peake's evidence that, at the time of the above correspondence with Messrs. Garner & Sons, he knew the address in Belgium of one of the children and also the address of the firm of solicitors in London who acted for the other five children.

Jenkins, K.C., and *J. S. Green*, for the plaintiff. The question is whether the vendor duly rescinded the contract for sale, or whether he rescinded capriciously and unreasonably. We do not contend that the vendor was bound to give notice that he would rescind unless the requisition was withdrawn or to give

his reason for rescinding: but if he states his reason, the Court will examine into the facts and consider whether he has acted reasonably; and the cases shew that some limit must be placed on the word "unwilling," and that the vendor must not act unreasonably or capriciously: *In re Dames and Wood* (1); *In re Star-Bowkett Building Society and Sibun's Contract* (2); *In re Glenton and Saunders to Haden.* (3) Here the reason given is that the requisition "in no way affects the title." That is a wholly unreasonable view to take, because it is vital to the title to shew that the trust for sale had arisen, and that could be shewn by proving that Mrs. Wells left a child her surviving. That is all we asked for—the date of birth of one child—and under sub-s. 6 of s. 3 of the Conveyancing Act, 1881, we were bound to pay for the expense the vendor might incur in obtaining that information for us. Also he could have referred us to the solicitors acting for the children: so that the suggestion as to trouble and expense is without substance. We submit that the requisition was reasonable, and that on the evidence the vendor acted capriciously and unreasonably in rescinding the contract. The fact that on receiving the letter of rescission we at once withdrew the requisition and offered to complete is an element in considering the bona fides of the vendor.

Upjohn, K.C., and *J. R. Brooke*, for the defendant.

[FARWELL J. Is there any reason why the purchaser should not now have completion? The vendor seems to have acted unreasonably throughout.]

The real issue is whether the vendor acted bona fide, and that infers reasonableness: *Woolcott* v. *Peggie.*(4) The cases shew that it must be a bona fide and not an arbitrary or capricious rescission. Arbitrary rescission is one not based on reason. The meaning of the words "unable or unwilling to comply" is considered in *Duddell* v. *Simpson* (5) and *In re Dames and Wood* (6), and is criticized by Chitty J. in *In re Star-Bowkett Building Society and Sibun's Contract.* (7) Here the vendor was

(1) (1885) 29 Ch. D. 626.
(2) (1889) 42 Ch. D. 375.
(3) (1885) 53 L. T. 435.
(4) (1889) 15 App. Cas. 42, 44.
(5) (1866) L. R. 2 Ch. 102, 107.
(6) (1884) 27 Ch. D. 172, 177; on appeal, 29 Ch. D. 626.
(7) 42 Ch. D. 383.

FARWELL J. 1906 QUINION v. HORNE.

nervous about expenses, and he may have acted unreasonably by mistake; but, although the Court may think he acted unreasonably, he acted honestly and under legal advice—although wrong advice—and therefore, we submit, he cannot be said to have acted arbitrarily or capriciously. The purchaser should have offered to pay the expenses of acquiring the information he desired.

FARWELL J. This case raises a question on the authorities relating to conditions of sale, and arises under the 11th condition, which is really common form, and runs: "And if any purchaser shall make any objection or requisition either as to title, the form of the conveyance or other assurance to the purchaser, or any matter appearing in the particulars, conditions, or abstract, or otherwise, which the vendor shall be unable or unwilling to remove or comply with, the vendor shall (notwithstanding any previous negotiations or litigation or attempt to remove or comply with the same) be at liberty to annul the sale." Now, this property was put up for sale by auction by a sole surviving trustee. The trust is contained in the will of a testator who died in 1858, and who devised the property to trustees on trust to pay the rents to his niece—afterwards a Mrs. Wells—for her separate use for her life, and after her death on trust to sell and divide the proceeds amongst her children living at her death, who had attained or should attain twenty-one years, in equal shares, but if Mrs. Wells should die without leaving a child, then on trust after her decease to convey the property to her brothers as tenants in common. It is obvious, therefore, that the exercise of the trust for sale depended on Mrs. Wells having children who should survive her, and no trustee of ordinary business capacity would attempt to sell unless he knew that there was at least one such child. Mrs. Wells died in May, 1905. This particular lot was knocked down to the plaintiff, and in due course he sent in certain requisitions. The third was directed to ascertain what children survived Mrs. Wells, and what were their names and addresses. The only answer is, "Mrs. Wells left six children her surviving." I pause there to say that I think the vendor's solicitor ought

to have given the information which he had. He did know the address of one of those six children, and he ought to have stated it; and he knew the address of the solicitors who acted for the other five children, and I think the least he could have done would have been to have given that address, saying that he did not himself know their addresses, but that they could be obtained from those solicitors. Then this requisition is followed by correspondence, and on October 30 the purchaser's solicitors write: "We are in receipt of your letter of the 28th inst., and shall be glad if you will inform us when and where one of Mrs. Sexton's [Mrs. Wells] children was born. Subject to this we enclose draft conveyance for your approval." That was a very reasonable requisition, so far as it is necessary to consider the reasonableness of the purchaser. He desired to obtain information which he not unnaturally supposed would be in the possession of a trustee who was about to distribute the proceeds of sale amongst a class of children as to whose title he would have to satisfy himself before he parted with the money. The answer is on the 31st from the solicitor of the vendor: "I have not the information as to the date and place of birth of Mrs. Wells' children in my possession, and I cannot see that it in any way concerns the purchaser." That last sentence is simply astounding. The dates and places of birth of Mrs. Wells' children were, of course, immaterial in themselves, but most material as leading up to evidence which obviously the purchaser was intending to procure for himself to shew that there were such children living at the death of the tenant for life, so that the trust for sale had arisen. Then on October 31 the purchaser's solicitors again write: "In reply to your letter of to-day, we submit that for the purpose of this title, and to shew that the trust for sale has arisen, it is necessary to prove Mrs. Sexton [Mrs. Wells] had some children, so if you can give us the date of the birth of one of her children who survived her, this will enable us to obtain a certificate of birth, and thus complete the title." I pause again to observe that all that they ask for is a date. They point out that they are going to obtain the certificate. There is no expense, therefore,

FARWELL J. 1906 QUINION v. HORNE.

in any way suggested to be incurred by the vendor, except so far as it may be the absolutely necessary expense of answering further requisitions when the first ones are not fully answered. The answer to that is: "I am in receipt of your letter of the 30th inst. I have not the information as to the date and place of birth of Mrs. Wells' children in my possession, and I cannot see that it in any way concerns the purchaser." Then on November 2 the purchaser's solicitors write again: "We are in receipt of your letter of yesterday. Mr. Sexton's will states that if the said M. A. Sexton Knevett should die without leaving a child the property is to be conveyed to other people. It is, therefore, incumbent on the vendor to prove that Mrs. Sexton [Wells] left lawful children her surviving, and we shall be satisfied if the date of the birth of one of the children now alive is supplied to prove this." That appears to me to be a very reasonable and moderate suggestion. The answer is: "In reply to your letter of the 31st ult., I am instructed to state that my client, the vendor, does not propose to comply with your requisition, and instructs me to rescind the sale. Your client is the only purchaser who has persisted upon, or in fact made, such a requisition, which in no way affects the title. I am, therefore instructed upon my client's behalf to rescind the sale, and the auctioneer has also been instructed to return your client his deposit money. Please return me the abstract and other papers which you have." Then the next day the purchaser writes and says: "We regret you cannot see your way to give us the information asked for. Under these circumstances we do not propose to press the matter. There is no question of rescinding the contract, and our client will refuse to accept the return of the deposit." The withdrawal of the requisition is within twenty-four hours, but the vendor refused to complete, and specific performance is now resisted on the ground that the contract was duly rescinded. The question I have to determine is whether that is so or not.

Now, the cases certainly shew that some limitation is to be put upon the word "unwilling." It is not to be merely the caprice of the vendor, in the sense that it is enough for him to say, "I will

not complete, and there is an end of it." Cotton L.J. in *In re Dames and Wood* (1) stated that in his opinion "The cases do certainly lay down this, that a vendor cannot avail himself of such a condition arbitrarily, or unless he shews some reasonable ground for his unwillingness to answer the requisitions." That statement was commented upon by Chitty J. in *In re Star-Bowkett Building Society and Sibun's Contract* (2), but his comments do not apply to the present case. He was suggesting that the Lord Justice's statement was not necessary for the decision of the case then before the Court of Appeal, and that the Lord Justice was talking about reasonableness and shewing reasonable ground when a vendor has stated his reasons, because it had been already decided that a vendor is not bound to give any reasons at all. Inasmuch as the vendor here and his solicitor have given their reasons, and have been cross-examined about them, I am not concerned to consider whether they were or were not bound to give reasons. I have merely to consider whether they are reasonable or not; but I am not prepared to say that the Court of Appeal in the *Star-Bowkett Case* (2), having the advantage of hearing Chitty J.'s judgment commenting on their own former decision, in any way intended to withdraw from what they had said before. They do not say so; and, moreover, Lopes L.J. in terms states (3): "This question turns on the meaning of this condition having regard to its terms and intention. In my opinion it gave the vendors a right to rescind, provided it was not done capriciously, and provided the unwillingness or inability was reasonable." Those are two distinct propositions. When a vendor has tendered himself as a witness and given his reasons, then Cotton L.J.'s statement is apposite, and I have to see whether those reasons are a mere arbitrary exercise of his own will, or whether they rest upon any rational foundation on which any ordinary reasonable man is entitled to rely.

Now, it is said that a vendor is not to act capriciously. I rather prefer the word "arbitrarily," which Mr. Upjohn suggested, and which I take to mean "without any reasonable

(1) 29 Ch. D 626, 630. (2) 42 Ch. D. 375, 383.
(3) 42 Ch. D. 389.

FARWELL J.
1906
QUINION v. HORNE.

cause." That is the test which I propose to apply to the present case. Now, the ground suggested is the fear of expense. It is said that these cestuis que trust were very urgent that no extra expense should be incurred, but it was not suggested that they should put their hands in their pockets for one penny. The answer could have been given as simply as possible. The vendor's solicitor had only to refer the purchaser to the cestui que trust in Belgium, whose address he had, and say, "Ask him; I do not know," or to the solicitors who acted for the other five children saying, "I do not know, but no doubt they will be able to tell you," and the vendor must have obtained this information in order to distribute the purchase-money. Instead of that, the vendor and his solicitor seem to have persuaded themselves that there was some terrible risk of costs underlying this most innocent and most necessary inquiry, and they absolutely refused to answer it. To my mind that was absolutely unreasonable. Unless a vendor is so much the master of the situation that he is entitled to say "I will not give you any information at all; I will not even tell you a man's address when I know it, so that you can go and ask him; I will not even tell you the names of the solicitors who act for the cestuis que trust, although I know it, and although it is obviously necessary that some information should be obtained about them," I do not see how in this case the rescission could be otherwise than arbitrary and wholly without reasonable cause. Unfortunately for the plaintiff, he has charged mala fides—that is to say, he desired to insinuate that the defendant wanted to get out of this contract in order to sell to somebody else at a higher price. The defendant's evidence has entirely displaced that. I think it is due to the defendant to say that I do not see any ground whatever for suggesting mala fides, in the sense of any dishonest purpose. A man may be as irrational as he pleases, and yet be honest. I do not understand Lord Macnaghten in *Woolcott* v. *Peggie* (1) to have intended in any way to qualify what has been decided in the Court of Appeal, or to say that nothing short of mala fides will avail in a case of this nature. Inasmuch as this charge of mala fides has been made and has

(1) 15 App. Cas. 42, 44.

failed, I cannot give the plaintiff any costs of the action, although he succeeds. There will be judgment for specific performance without costs. FARWELL J. 1906 QUINION v. HORNE.

Solicitors: *Wickes & Knight, for Garner & Sons, Hounslow; H. R. Peake.*

H. L. F.

BADISCHE ANILIN UND SODA FABRIK *v.* ISLER.

BUCKLEY J. 1906 *Feb.* 22, 23, 24.

[1905 B. 964.]

Patent—Infringement—Licence—Condition—Purchase of patented Article from Licensee without Notice of Condition—Estoppel—Purchaser's Liability to Action for infringement.

If a patentee sells the patented article and the purchaser uses it he does not infringe, because the law implies a licence by the patentee to the purchaser to sell or deal with the article as he pleases, unless at the time of the purchase the patentee imposed a condition. If a purchaser buys from a licensee to whose licence the patentee has attached conditions, nothing turns (so far as licence as distinguished from estoppel is concerned) on the question whether the purchaser knew of the conditions or not. If a person innocently uses a patented invention, not knowing that there is a patent, he is none the less an infringer; and if he buys from a licensee, not knowing that there are limits to the licence, he is equally an infringer. In this case, however, the patentee may be estopped from suing in certain circumstances, as, for instance, if he has acted in such a way as to lead the purchaser to suppose that the licence is not limited.

Action for infringement of patent.

On July 7, 1888, an agreement was entered into between the Badische Anilin und Soda Fabrik and the Society for Chemical Industry in Basle, whereby the former gave to the society a licence to manufacture and sell dyes under certain patents. Clauses 4 and 7 of the agreement, as translated from the German original, were as follows:—

"4. For the sale of Rhodamine dyes in patent countries, as also in non-patent countries, types and selling prices, as also the conditions of selling, are to be settled by the Badische Anilin und Soda Fabrik; and the Society for Chemical Industry binds itself accurately and strictly to respect these types, not only in

BUCKLEY J. 1906 BADISCHE ANILIN UND SODA FABRIK v. ISLER.

respect of strength, but also as to shade, also as to selling prices and conditions of sale, and also to see that these are observed by their agents and servants. Further, the Society for Chemical Industry binds itself not to sell the Rhodamine dyes coming into consideration to persons who sell the dyes again, but only to consumers, and this shall be done either directly from Basle or by their particular agents, and these may only sell the dyes in the original packages with the original labels attached. The names of these agents in every country are to be communicated in writing upon the execution of this agreement. In case of any alterations occurring such alterations are to be communicated in writing from time to time to the Badische Anilin und Soda Fabrik."

"7. The further working out of the group of Rhodamine dyes will be undertaken by both agreeing parties at their mutual cost and the results thereof shall be mutually exchanged. If by this work the Society for Chemical Industry shall discover new colouring matters not already indicated in the principal patent of the Badische Anilin und Soda Fabrik No. 44002, then these shall also not be liable to the royalty fixed by paragraph 3. Patents for such dyes shall be taken in Germany, France, and England in the name of the Badische Anilin und Soda Fabrik, which shall grant the Society for Chemical Industry licences. As to [? patents in] the United States, which in each case will be taken in the name of the inventor, the Badische Anilin und Soda Fabrik receives for itself or for its agents there a licence free of cost. The Badische Anilin und Soda Fabrik binds itself not to grant licences to other parties upon patents which fall under this paragraph except by mutual agreement of the parties."

In 1892 the plaintiffs obtained in England a patent No. 9633* for an invention of the manufacture and production of Rhodamine 6 G. Both the plaintiffs and the society assumed that this patent was within the agreement of 1888, but no licence to manufacture and sell under it was actually given to the society. In 1897 Wills J. certified as to the validity of the patent. The plaintiffs alleged that Mr. Otto Isler, who carried on business in Manchester, had infringed their patent by purchasing in this country and subsequently selling Rhodamine 6 G

made in accordance with the invention described in their specification.

Mr. Isler was a dealer in and not a consumer of dyes, and he had been in the habit of buying Rhodamine 6 G from the society, till in 1896 they informed him that they could no longer supply him with it because of an arrangement which they had with the plaintiffs. He then arranged with Kerr & Hoegger, Limited, of Manchester, that they should purchase from the society larger quantities of Rhodamine 6 G than formerly and pass on part of these purchases to him; and this was done for some years. Both Mr. Isler and Kerr & Hoegger (who were consumers as well as dealers) alleged that they knew nothing of the terms of the licence under which the society made and sold the dye, but that they believed that it was a full and unqualified licence.

In May, 1899, the plaintiffs issued to the trade a circular in which they referred to past litigation, and stated that: "Only the Rhodamine 6 G manufactured by ourselves and by our licensees the Society for Chemical Industry in Basle is legitimate Rhodamine, and can be recognized in that it bears a special patent label."

Both the plaintiffs and the society always sold Rhodamine 6 G in England in tins having attached to them a label in the following terms: "Made in Switzerland. Manufacture of Aniline Colors. Society of Chemical Industry in Basle (Switzerland). RHODAMINE 6 G. Blue Shade. No. 8083. Net lb. 5. Important Notice. Purchasers of this dye are not licensed to resell it except in the unopened original package in an unchanged condition and with the labels thereon intact; nor are any persons other than purchasers of such unopened original package licensed to use the dye contained therein. All other sales or use are infringements. Agents and dealers are not empowered to vary this licence in any way. Society of Chemical Industry in Basle. Protected by English Letters Patent. The resale and importation of our patented articles to the United States of America is prohibited."

The plaintiffs brought this action against Mr. Isler, and he contended that Kerr & Hoegger were entitled to buy dye from

BUCKLEY J. 1906

BADISCHE ANILIN UND SODA FABRIK v. ISLER.

the society and resell it to him without involving him in any liability to the plaintiffs for infringement of their patent.

Cripps, K.C., and *J. C. Graham*, for the plaintiffs. The defendant is in the position of an ordinary infringer, and is not protected by the licence given to the society. That licence contained to his knowledge restrictions which made it impossible for a purchaser from the licensees to resell the dye. This patent is within clause 7 of the agreement, and the society sell the dye under an implied licence on the terms mentioned in clause 4. They are therefore bound to sell it to consumers only, not to dealers. But the defendant is a dealer and not a consumer, so that the society could not sell to him and give him the right to resell it.

We agree that if a patentee sells the patented article the purchaser from him has an implied right to use the article as he pleases, unless at the time of the sale he is informed that there are restrictions on the user. But a patentee can attach conditions to the sale of his patented articles so that the condition will run with the goods. Then a purchaser of the goods will be bound by the condition unless he shews that the sale was valid and that at the time of the sale he had no notice of the conditions. *Incandescent Gas Light Co.* v. *Cantelo* (1) does not help the defendant, for there it was held that there was no defect in the sale, and that in order to import a condition subsequently to the sale notice of it to the purchaser must be proved. Here the sale was not justified at all. A person who buys and uses a patented article not knowing of the patent is nevertheless liable as an infringer, and the same rule applies to purchases from a licensee whose licence is limited. The plaintiffs have not parted with any of their rights. If this patent is not within the agreement and the society have no licence in respect of it, there is no defence to this action.

It is clear from the evidence that Mr. Isler knew of the restriction in the supposed licence, or at all events that he knew enough to put him on inquiry. He is therefore bound by the restriction: *Incandescent Gas Light Co.* v. *Brogden*. (2)

(1) (1895) 12 Rep. Pat. Cas. 262. (2) (1899) 16 Rep. Pat. Cas. 179.

Astbury, K.C., and *A. Colefax*, for the defendant. No licence in the terms of clause 4 of the agreement was ever granted to the society to work this patent, nor would it have been necessary to do so, for clause 7 does not specify any terms. The society have no doubt been manufacturing and selling Rhodamine 6 G under some implied licence, but the terms of that licence must be gathered from a consideration of all the circumstances. The sale of the dye by the society was authorized, and if there were any restrictions on the licence the plaintiffs must prove what they were, and that they were given out to the world. The only statements they have made are by the circular and the label, which shew that the society might sell freely in unopened tins. When patented goods are sold by the patentee they become free articles, and anybody may deal with them as he thinks fit: *Incandescent Gas Light Co.* v. *Cantelo* (1); *United Telephone Co.* v. *Walker*. (2)

Unless we had notice of the restrictions at the time of the sale we were not bound by them: *Incandescent Gas Light Co.* v. *Cantelo*. (1) The plaintiffs are estopped from saying that the bargain is different from that disclosed on their labels. They have never given notice to the defendant that the society were not at liberty to sell to a dealer.

Assuming that the licence is in the terms of clause 4 of the agreement, the society have not committed a breach of it. They sold to Kerr & Hoegger, who were consumers, and were therefore entitled to buy and to resell what they did not want. There was at this time no contract between Mr. Isler and the society. The property in the dye passed to him, for he did not know of the restrictions. In *Incandescent Gas Light Co.* v. *Cantelo* (1) the purchaser was held not to have infringed because he did not know of the restrictions when he bought the goods.

The loss falls on the patentees, who put it into the power of the licensees to sell the dye. Patented goods are not like ordinary goods. Conditions can be attached to their sale, and infringing goods can be ordered to be delivered up to the patentee: *British Mutoscope and Biograph Co.* v. *Homer*. (3) There cannot be a

(1) 12 Rep. Pat. Cas. 262. (2) (1886) 4 Rep. Pat. Cas. 63, 67.
(3) [1901] 1 Ch. 671.

BUCKLEY J. 1906 BADISCHE ANILIN UND SODA FABRIK v. ISLER.

condition running with ordinary goods: *Taddy & Co.* v. *Sterious & Co.* (1); *McGruther* v. *Pitcher.* (2) A patentee gives to a person who buys from him the patented article an implied licence to deal with it as he pleases, unless he tells him at the time of the sale that there are restrictions: *Betts* v. *Willmott* (3); *Heap* v. *Hartley* (4); *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Patent Sand Blast Co.* (5) It is not suggested that Kerr & Hoegger had notice of any restrictions.

Cripps, K.C., in reply.

Cur. adv. vult.

Feb. 24. BUCKLEY J. The defendant has bought and sold dyes known as Rhodamine 6 G, manufactured under a patent No. 9633* of 1892, belonging to the plaintiffs. The plaintiffs sue for infringement. The defendant justifies by saying that he bought the dyes under a licence granted by the plaintiffs to persons whom I will call the society. The plaintiffs rejoin that the licence did not authorize the sale. Under the statute the plaintiffs are entitled to the sole privilege and authority by themselves, their agents, or licensees, and no others, to make, use, exercise, and vend the invention. If a patentee sells the patented article to a purchaser and the purchaser uses it, he, of course, does not infringe. But why? By reason of the fact that the law implies from the sale a licence given by the patentee to the purchaser to use that which he has bought. In the absence of condition this implied licence is a licence to use or sell or deal with the goods as the purchaser pleases: *Thomas* v. *Hunt* (6); *Betts* v. *Willmott.* (3) If the patentee sells, imposing no restriction or condition upon his purchaser at the time of sale, he cannot impose a condition subsequently by delivery of the goods with a condition indorsed upon them or upon the package in which they are contained. Unless the purchaser knows of the condition at the time of purchase and buys subject to the condition, he has the benefit of an implied licence to use free from condition. But suppose

(1) [1904] 1 Ch. 354.
(2) [1904] 2 Ch. 306.
(3) (1871) L. R. 6 Ch. 239, 245.
(4) (1888) 5 Rep. Pat. Cas. 603.
(5) (1883) 25 Ch. D. 1.
(6) (1864) 17 C. B. (N.S.) 183.

the purchaser buys, not from the patentee, but from a licensee, the patentee may have attached to his licence any conditions he pleased, and if he did attach a condition, then upon principle it seems to me that nothing (so far as licence as distinguished from estoppel is concerned) can turn on the question whether the purchaser from the licensee knew of the condition or not. If a person innocently uses a patented invention, not knowing that there is a patent, he is none the less an infringer, and if a person innocently buys a patented invention from a licensee and uses it not knowing that there are limits on the licence, I conceive that he is equally an infringer. Suppose the patentee sells to A., with the condition that A. shall not resell or grant the right of use to another, then, if B. becomes sub-purchaser from A., it cannot be said that he is licensed by the patentee to use, for ex hypothesi he is not. It may be that the patentee may be estopped, as between himself and B., from saying that B. is not so licensed, and as regards *Incandescent Gas Light Co.* v. *Cantelo* (1), this must, I think, have been the ratio decidendi, for it would seem that the agent there was not authorized to sell except subject to conditions. If the purchaser knows the restrictions of course he is bound by them: *Incandescent Gas Light Co.* v. *Brogden.* (2) In such a state of facts the patentee cannot be estopped, and to a patented article conditions may be attached because the goods have this special quality or characteristic, that, except with the licence of the patentee, they cannot be used or sold, thus differing from goods in general to which a condition cannot be attached so as, so to speak, to follow the goods: *McGruther* v. *Pitcher.* (3) There is, however, I think, some difference between *Incandescent Gas Light Co.* v. *Cantelo* (1) and the present case, in that that was a case of agent and not of licensee. The contract there was with the patentee through an agent. The agent did not disclose the condition to the purchaser when he bought, so that the case is in this rather more like that which I first put, of a sale by the patentee than a dealing by a licensee.

The facts of the present case are that in July, 1888, the

(1) 12 Rep. Pat. Cas. 262. (2) 16 Rep. Pat. Cas. 179.
(3) [1904] 2 Ch. 306, 312.

BUCKLEY J.
1906
BADISCHE ANILIN UND SODA FABRIK v. ISLER.

plaintiffs granted a certain licence to the society. The patent here is of later date—namely, 1892—and is not bound by that agreement unless under article 7 there is an executory agreement to grant a licence to use it. No licence was ever granted expressly by the patentee. The decision of the present case, I think, rests upon ascertaining what implied licence was granted. The plaintiffs say that the implied licence included a term such as that which is found in article 4 of the agreement, which provides that the society, the licensee, shall not sell to dealers, and that the defendant was a dealer. In my judgment, the implied licence was not fettered by that restriction. This is a question of fact. If, under article 7, there was a right to a licence, what licence was granted? And if under article 7 there was not a right to a licence, was there any and what licence granted by the plaintiffs to the society? The plaintiffs issued a circular in which they spoke of the society as "our licensees," but mentioned no restrictions. The plaintiffs themselves, and the society also, sold the goods with a label expressed as follows: "Important notice. Purchasers of this dye are not licensed to resell it except in the unopened original package in an unchanged condition, and with the labels thereon intact; nor are any persons other than purchasers of such unopened original package licensed to use the dye contained therein. All other sales or use are infringements. Agents and dealers are not empowered to vary this licence in any way." Now I understand that label, by implication, to say that purchasers of this dye are licensed to resell it in the unopened original package, and that persons who are purchasers of the unopened original package are licensed to use the dye contained therein, and that such sales or uses are not infringements. From the course of business, and having regard to the fact that all sales were made under that label, I hold that the implied licence was a licence to the society to sell, subject to the restrictions in that label, and subject to no other restrictions or conditions. What is the evidence to the contrary? It is this: Previous to the year 1896 the society sold direct to the defendant. In 1896 the society informed the defendant that they could no longer supply him with Rhodamine 6 G on account of an arrangement

which they had with the plaintiffs. The society refused to supply the defendant direct, and the society knew that the defendant was arranging to buy what he wanted through Kerr & Hoegger because he could not buy direct. It does not follow that the restrictions contained in the agreement of July 7, 1888, were known to the defendant or that he knew that the licence under which the society were purporting to deal was that licence as distinguished from a licence upon some other terms. There was some arrangement, and that was all he knew. He says expressly—and, in fact, there is no evidence to the contrary—that he did not know that it was alleged that their licence was a restricted licence till some time in the course of last summer, after the commencement of this action. Probably the origin of the alteration in the practice of the society was due to this, that in the year 1896 an arbitration commenced in Germany between the plaintiffs and the society, and in that arbitration something was in dispute as to the defendant Isler. It is enough to say that it may have been that the society refused to sell direct, because in that arbitration the plaintiffs were asserting, and, for aught I know, the society were denying, that Rhodamine 6 G was bound by the restrictions in the agreement. What happened was that in November, 1898, the law suit before the arbitration Court, in the matter of Isler & Co., was dropped. That is all I know about that arbitration.

To my mind the form of the label which was used by the society with the plaintiffs' knowledge is much better evidence of what the implied licence was than anything which is to be inferred from the fact that a difficulty had been raised in respect of the defendant's buying direct from the society. But further, whatever were the terms between the plaintiffs and the society, it seems to me that upon the doctrine of *Incandescent Gas Light Co.* v. *Cantelo* (1), whether upon the ground upon which it is said that Wills J. rested it or, as I should prefer to put it, on the ground of estoppel, the plaintiffs cannot set up against the defendant that the licence was other than a licence to sell subject only to the restrictions in the label which the plaintiffs used and which the society used with the plaintiffs' knowledge. The

(1) 12 Rep. Pat. Cas. 262.

BUCKLEY J.

1906

BADISCHE ANILIN UND SODA FABRIK v. ISLER.

defendant did not know of the restrictions in the agreement. It is objected that he ought to have inquired about it. Why should he have inquired when the dye was sold to him under a label, the plain implication of which, to my mind, was that, provided the unopened package was the thing sold, there was a right to resell it. In order to establish their case the onus is on the plaintiffs to shew that as against the defendant they are entitled to set up—first, that there was such a restricted licence as they assert; and, secondly, that he was bound by it. In my opinion they fail to discharge that onus. I think that they not only do not discharge the onus upon them, but, upon the facts, I arrive at the conclusion that the implied licence did not include the restrictions which it is sought to impose. Under these circumstances I think that the defendant does not infringe, and I dismiss the action with costs.

Solicitors: *J. H. & J. Y. Johnson; Pritchard, Englefield & Co., for Boote, Edgar & Co., Manchester.*

H. C. R.

In re CLARK.

SWINFEN EADY J.

1906

March 1.

[1904 C. 2538.]

Lands Clauses Acts—Costs—Reinvestment in Land—Purchase-money exceeding Fund in Court—Apportionment—Form of Order—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c 18), *s.* 80.

The owners of a fund in Court, representing land taken compulsorily by a public body, proposed to invest more than double the amount of the fund in the purchase of fresh land, paying the purchase-money pro tanto out of the fund in Court and finding the balance themselves:—

Held, that under s. 80 of the Lands Clauses Consolidation Act, 1845, the public body must pay the costs of re-investment except so far as they were increased by reason of the purchase-money exceeding the fund in Court.

Order in Seton on Judgments, 6th ed. p. 2457, Form 2, adopted.

Practice discussed.

SUMMONS.

This was an application by the trustees of Clark's will for the reinvestment in land of a sum of 888*l.* 17*s.* 9*d.* India 3½ per Cent. Stock in Court, representing a sum of 930*l.* paid into Court by the London County Council as the purchase-money of certain land taken by them under the compulsory powers of the London County Council (Tramways and Improvements) Act, 1901 (1 Edw. 7, c. cclxxi.). The money was paid in on July 19, 1904, and invested in pursuance of an order of August 12, 1904. The applicants had contracted to buy twelve freehold houses at Southfields for 2178*l.* 17*s.* 3*d.* from a vendor registered with an absolute title. They proposed to pay the purchase-money partly out of the fund in Court and the balance out of capital moneys in their hands. The conveyancing counsel had approved the vendor's title and settled the necessary deeds, and the only question was what was the proper form of order as to costs.

The Master proposed to make the following order in accordance with Seton on Judgments, 6th ed. p. 2457, form 2, viz.:—

"And it is ordered that, pursuant to the 80th section of the Lands Clauses Consolidation Act, 1845, the London County Council do pay to the applicants their costs, including therein all

SWINFEN EADY J.
1906
CLARK, *In re.*

reasonable charges and expenses incident thereto of the said investment and of this order to be taxed by the taxing Master, but the taxing Master is not to allow any portion of the said costs, and costs, charges and expenses which may have been incurred by reason of the said purchase-money exceeding the amount of the said sum of 888*l.* 17*s.* 9*d.* India 3½ per Cent. Stock."

The London County Council considered that the costs, charges and expenses other than the costs of the application ought to be apportioned in proportion to the amount contributed by the Council and applicants respectively, and proposed the following order:—

"And it is ordered that it be referred to the taxing Master to tax the costs of the applicants of this application, including therein all reasonable charges and expenses of and incidental thereto of the investment of the sum of 2178*l.* 17*s.* 3*d.* in the purchase of the said land and of obtaining this order and of all proceedings relating thereto. And in such taxation the Master is to distinguish therefrom the costs, charges and expenses of the investment of the said sum of 2178*l.* 17*s.* 3*d.*, including all ad valorem fees, brokerage and scale fees.

"And it is, pursuant to the 80th section of the Lands Clauses Act, 1845, ordered that the said London County Council pay to the applicants their costs of this application to be taxed as aforesaid, and such proportion of the costs, charges and expenses so to be distinguished as aforesaid as the amount of the purchase-money contributed by the Council bears to the whole purchase-money of 2178*l.* 17*s.* 3*d.*"

The summons was therefore adjourned to the judge, who adjourned it into Court on the question of costs.

Eve, K.C., and *E. S. Ford*, for the applicants. The form in Seton, p. 2457, was settled by Knight Bruce V.-C. in *In re Branmer's Estate* (1), and was followed by Stuart V.-C. in *In re Loveband's Settled Estates* (2); by Malins V.-C. in *Attorney-General* v. *Rochester Corporation* (3); by the Lords Justices in Lunacy

(1) (1849) 14 Jur. 236. (2) (1860) 9 W. R. 12.
(3) [1867] W. N. 142; 15 W. R. 765.

in *In re Brown* (1); and by Kay J. at chambers in *In re Metropolitan Ry. Co. and Gonville and Caius College, Cambridge.* (2) It is the form almost universally adopted.

R. J. Parker, for the London County Council. The form in Seton is frequently adopted, but it is not the only form. The question is what is fair between the parties in any particular case. Under s. 80 the Council must pay (inter alia) the costs of reinvesting the fund in Court, and the costs of obtaining the proper orders for that purpose, and those costs include "all reasonable charges and expenses incident thereto."

Now, where the purchase-money largely exceeds the fund in Court, it is unreasonable that the Council should bear the whole of the incidental expenses. The form in Seton would no doubt protect them in the matter of stamps, or scale fees, or anything else proportional to the purchase-money. But it is no protection in practice as to conveyancing counsel's fees, surveyor's fees, or the non-scale solicitor's fees charged in the case of registered titles. These fees are obviously increased by the larger purchase, but in practice the taxing Master allows them in full.

[SWINFEN EADY J. The surveyor's fee would prima facie be apportionable: *Ex parte London Corporation.* (3)]

That was specially provided by the order. A surveyor's fee is proportional to his own valuation, and not to the amount of the purchase-money. It is not clear that the order in Seton makes it apportionable, and in practice the Council have to pay it, unless specially mentioned in the order. In *Ex parte Bishop of London* (4) and *In re Bishopsgate Foundation* (5) the costs were borne by the public bodies in equal shares, except the ad valorem costs, which were borne rateably according to the amounts contributed.

[SWINFEN EADY J. Those were cases of apportionment between the public bodies inter se.]

That is so, but the principle is the same.

The form in Seton is not the common order at the present

(1) (1878) Aug. 3, A. 2916, unreported.
(2) (1887) March 24, A. 913, unreported.
(3) (1868) L. R. 5. Eq. 418.
(4) (1860) 2 D. F. & J. 14.
(5) [1894] 1 Ch. 185; 42 W. R. 199; Seton, 2458.

SWINFEN EADY J.
1906
CLARK
In re.

day. In *Ex parte Perpetual Curate of Bilston* (1) North J. ordered an apportionment between the public body and the applicant.

[SWINFEN EADY J. That was a very special order. There were two parcels of land, two contracts, two inquiries as to title, and two conveyances, as appears from the order in Seton p. 2432.]

The decision recognizes the principle of apportionment in a proper case. In *In re Power's Settlement* (2) Hall V.-C. ordered an apportionment between the public body and the applicants.

[SWINFEN EADY J. In that case the applicants must have come to the Court to sanction their investment even if no lands had been taken by the public body.]

That only affected the costs of the application, which were ordered to be borne in moieties. The stamps and surveyor's fees were ordered to be borne rateably in proportion to the funds invested. In *Ex parte Christ Church, Oxford* (3), the purchase-money was 5250*l.*, and the funds in Court contributed by three public bodies were 662*l.* on deposit, 3594*l.* Consols, and 756*l.* Consols, i.e., about 12½ per cent. short of the purchase-money. The public bodies were ordered to bear the whole costs of the application in equal shares, but only such proportion of the other costs, charges and expenses as the amounts contributed by them respectively bore to the whole purchase-money.

[SWINFEN EADY J. That was a Master's order departing from the ordinary practice.]

These orders are frequently made by the Masters in this form. The former practice has been found to work injustice, and has been altered, but as these applications are made in chambers and are consequently unreported, the altered practice has not been incorporated in Seton.

No practice can alter the express words of s. 80 or make the Council liable for more than the costs of the application and the reinvestment, including "all reasonable charges and expenses incident thereto." If the applicants are right they could utilize a small fund in Court for the purpose of investing 10,000*l.*

(1) [1889] W. N. 17; 37 W. R. 460.
(2) [1876] W. N, 205.
(3) (1905) C. 163, Farwell J. at Chambers, Dec. 14, 1905, unreported.

There might be a far larger number of abstracts to peruse. It is really not a question of practice, but of discretion and doing justice in each particular case.

[SWINFEN EADY J. Before the order in *In re Metropolitan Ry. Co. and Gonville and Caius College, Cambridge* (1), was made, an elaborate memorandum of the practice was prepared by the registrar at the judge's request. Kay J. adopted the principle therein stated, and it was subsequently followed by North J. and Chitty J., as appears by a note at the foot of the memorandum. (2)

(1) (1887) March 24, A. 913, unreported.

(2) The memorandum, which has been noted up from time to time, was as follows:—

In re METROPOLITAN RAILWAY COMPANY AND GONVILLE AND CAIUS COLLEGE, CAMBRIDGE.

KAY J. at Chambers, March 24, 1887.

THE question is how much of the costs of an application by the college under the Lands Clauses Consolidation Act, for investment in land, ought to be paid by the company where the purchase-money exceeds the fund paid in by the company.

The purchase-money is 17,000*l.*

The fund in Court is 4187*l.* 10*s.* 7*d.* Consols.

The college propose to apply it and 564*l.* 8*s.* 5*d.*, Reduced 3*l.* per Cent. Annuities in Court to the credit of *Caius College* v. *Meadows*, and to make up the balance (about 12,000*l.*) in cash.

Where the purchase-money exceeds the fund in Court paid in by the company, and the applicant provides the excess in cash, the company has to pay the whole costs, except so far as they have been increased by reason of the purchase-money exceeding the fund: Ex parte Hodge ((1848) 16 Sim. 159); *Ex parte King's College, Cambridge* ((1852) 5 De G. & Sm. 621); *In re Branmer's Estate* (14 Jur. 236: Knight Bruce V.-C.); *In re Loveband's Settled Estates* (9 W. R. 12: Stuart V.-C.); and see Seton 4th ed., p. 1441, form 2, and p. 1444.

But it is contended by the company that where the additional purchase-money or part of it is provided out of another fund in Court, as in the present case, they are liable to pay only one-half of the costs. In *Ex parte Bishop of London* (2 D. F. & J. 14; May 25, 1860: Knight Bruce and Turner L.JJ.) the main point as to costs decided was that the fourteen companies were to pay the costs in equal shares, and not in proportion to their respective funds, but as there were fifteen funds (the fifteenth being a fund standing to the credit of "The Copyhold Commissioners, Ex parte the Bishop of London") the fourteen companies were ordered to pay the whole costs in fourteenths. This decision seems to be exactly in point, notwithstanding the circumstance that the copyhold fund was to be resorted to only in case of deficiency of the other funds. In *Attorney-General* v. *Rochester Corporation* ([1867] W. N. 142; 15 W. R. 765; May 4, 1867), Malins V.-C. held that where there were three funds, one paid in by the Crown, which was not liable for costs, the two companies must pay

SWINFEN EADY, J.

1906

CLARK, *In re.*

(His Lordship read the italicized portions of the memorandum.) The substance of the memorandum is given in Seton, p. 2461 (last twelve lines of last paragraph) and p. 2466, par. 2.]

The order in Seton does not carry out this memorandum. It should provide that the Council are to pay the costs except so far as they have been increased by reason of the applicants utilizing the application for the investment of additional purchase-money. The Court is not asked to alter the practice or to lay down any new rule, but merely to say that the order in Seton does not meet the exigencies of every case, and that it may be

---

the whole of the costs in moieties, the case being the same in principle as *In re Branmer's Estate*, where the money was supplied by the petitioner.

The general principle to be deduced from these cases is that a respondent corporation which is under a statutory obligation to pay the costs of an application has a right of contribution against co-respondents who are under the same obligation, but has no claim to be exonerated from any portion of such costs (except so far as they are increased, &c.) by reason of the applicant utilizing the application for the investment of additional purchase-money.

On the other hand, in *Ex parte Ecclesiastical Commissioners of England* ((1865) 11 Jur. (N.S.) 461; March 17, 1865), Stuart V.-C. held that where there were seventeen funds, and six respondents not liable to pay costs, the eleven companies were to pay "their share of the costs in seventeenths," and in *In re Power's Settlement* ([1876] W. N. 205), Hall V.-C. held that where the application was to invest a settled fund in the hands of trustees, as well as the fund paid in by the company, the company ought to pay only one-half of the costs.

In Seton, 4th ed., the practice is stated at p. 1444, where *Attorney-General* v. *Rochester Corporation* and *In re Branmer's Estate* are cited but not *In re Power's Settlement*.

C. CARRINGTON,
Registrar.

April, 1887.

The question was afterwards argued in chambers, when the judge varied the order by directing the railway company to pay all the costs except so far as they had been increased by reason of the purchase-money exceeding the company's fund. Kay J. said that he was quite satisfied that the general principle was as stated above and that *Ex parte Bishop of London* and *Attorney-General* v. *Rochester Corporation* were the leading cases.

Followed by North J. in chambers in *Ex parte Metropolitan Board of Works, In re Adamson* ((1891) Jan. 17, unreported), after reading this statement, although his own subsequent decision in *Ex parte Perpetual Curate of Bilston* ([1889] W. N. 17; 37 W. R. 460) was brought to his attention.

The same order made by Chitty J. in chambers in *In re London & North Western Ry. Co. and Carlisle Corporation* ((1890) June 11, unreported).

altered to suit any special circumstances. In the present case it is submitted that the costs, charges, and expenses other than the costs of the application should be apportioned.

Eve, K.C., in reply. The order is in common form, and I am instructed that the taxing Master would in fact apportion the surveyor's fees under it. The Council ought to bear the fees of the conveyancing counsel, as if there had been no fund in Court the applicants would have accepted an absolute title without employing counsel to examine it. The fact that certain Masters have occasionally made irregular orders cannot alter the practice. If the order in Seton is really misconstrued in the taxing office as suggested, the proper course is to review the taxation, and not to alter a well-established form of order.

SWINFEN EADY J. This summons has been adjourned into Court merely on the question of costs. It is an application for the reinvestment of the proceeds of sale of land taken by the London County Council under compulsory powers. The purchase-money is over 2000*l.*, and the fund in Court is under 1000*l.* Therefore, rather less than half the purchase-money is covered by the fund representing the money paid into Court by the London County Council, and rather more than half must be found by the applicants. What is the proper order as to costs under these circumstances?

Now, the practice under the Lands Clauses Consolidation Acts has been well settled for very many years. The order in common use is that in Seton, p. 2457, form 2. It is adopted where part of the purchase-money is provided out of the fund in Court, and the balance found by the applicants. After directing taxation of costs as in form 1, it provides: "But the taxing Master is not to allow any portion of the said costs, and costs, charges and expenses which may have been incurred by reason of the said purchase-money exceeding the amount of the said sum of £——." Amongst the cases referred to as following that form is *In re Metropolitan Ry. Co. and Gonville and Caius College, Cambridge.* (1) It appears that before giving his decision in that case, Kay J. fully inquired as to the

(1) (1887) March 24, A. 913, unreported.

SWINFEN EADY J.

1906

CLARK, *In re.*

practice. A careful memorandum (1) prepared by the registrar was submitted to Kay J., who adopted the principle therein stated. The same principle was followed by North J. after reading the memorandum, and the same order was made by Chitty J. on June 11, 1890, in *In re London and North Western Ry. Co. and Carlisle Corporation.* (2) The substance of the memorandum is stated in Seton, p. 2461 (last twelve lines of last paragraph) and p. 2466, par. 2. There is one form of order where the applicant finds part of the purchase-money, and another where the companies or public bodies contribute the whole. In the former case it is well settled that the companies or public bodies pay the whole costs except so far as they have been increased by reason of the purchase-money exceeding the fund in Court. In both cases there may be apportionment between the public bodies inter se. This is a well-settled rule and carries out the provisions of s. 80.

It is said that the rule has caused hardship in certain cases, and that, having regard to the taxing office practice, the common form order throws the whole of the surveyor's fee and conveyancing costs on the public body, or at all events a larger portion than they would have to bear if the application were confined to the reinvestment of the fund in Court. In the particular case it is said that the London County Council will have to pay a larger surveyor's fee, and that it is not the practice of the taxing Masters to apportion that fee. Now, it may well be that there is no definite practice to apportion the surveyor's fee in every case. In some cases it would be inequitable, in others right, to do so.

In some cases a surveyor might not have been employed at all, apart from there being a fund in Court. The surveyor's fee is then wholly caused by the fact of the fund being in Court. On the other hand, there might be a case where the fund in Court was so small and the purchase-money so large that the surveyor's fee was almost as much as the fund in Court. That would be an extreme case in the other direction, and it would be difficult to resist an apportionment.

I am not satisfied that an order in the usual form works any injustice in practice. If and when a case arises in which

(1) See note ante, pp. 619, 620. (2) (1890) June 11, unreported.

the public body are aggrieved by the taxation they can always bring the matter to the attention of the Court on an application to review.

It would be impracticable, and tend to cause additional expense, if the judge, on the hearing of the petition, were to require evidence as to the various items of costs incurred, and to determine how they ought to be apportioned. These are matters of detail for the taxing Master, whose decision is open to review.

The order will therefore follow the form in Seton, p. 2457.

The order as drawn up provided (inter alia) as follows:—

And it is, pursuant to the 80th section of the Lands Clauses Consolidation Act, 1845, ordered that the London County Council do pay to the applicants their costs, including therein all reasonable charges and expenses incident thereto of the said investment and of obtaining this order and of all proceedings relating thereto to be taxed by the taxing Master, but the taxing Master is not to allow any portion of the said costs, and costs, charges and expenses which may have been incurred by reason of the said purchase-money exceeding the proceeds of the sale of the fund in Court.

Solicitors: *Burchell, Wilde & Co; T. W. Seager Berry.*

G. R. A.

WARRINGTON J.

1906

Feb. 24.

In re BLEW.
BLEW *v.* GUNNER.

[1905 B. 4168.]

Will — Construction — Discretionary Trust for Maintenance — Validity — Remoteness.

A testator by his will devised and bequeathed certain real and personal estate to trustees upon trust to apply the income thereof in such proportions and generally in such manner as to them in their absolute discretion should seem best for the support of his "son W. and his wife and children, or any of them," or to accumulate the same or any part thereof at their like discretion for the benefit of the children of his son who should become entitled to the corpus of the property under the trust thereinafter contained; and subject to such discretionary trust he directed his trustees to pay the income to his son during his life and after his decease to his widow during her life or widowhood, and after the death of the survivor to stand possessed of as well the corpus as the income upon trust for the children of his son who should attain twenty-one :—

Held, that the discretionary trust for maintenance was limited to the life of W., but, if not so limited, was void for remoteness.

Head-note to *Gooding* v. *Read*, (1853) 4 D. M. & G. 510, corrected.

In re Wise, [1896] 1 Ch. 281, and *In re Watson*, [1892] W. N. 192, not followed.

ORIGINATING SUMMONS.

William John Blew, by his will dated October 19, 1887, appointed G. B. Mason and N. H. Walker executors and trustees thereof, and gave and devised unto them his freehold messuage, No. 17, Cockspur Street, together with the goodwill of the business carried on thereon, and known by the name of "Bayleys," and his house, No. 13, Warwick Street, used as a warehouse for "Bayleys," together with all the stock, furniture, fittings, and contents whatsoever in or about the said several messuages or premises or either of them, upon trust that his trustees should so long as they should in their absolute discretion deem fit or advantageous for his estate, carry on the said business called "Bayleys," and apply the net income arising from the same in manner thereinafter provided. And

the testator gave to his trustees a power of sale over the said messuages and premises and goodwill, all of which were thereinafter included in the term "Bayleys." And he directed his trustees "to apply the said net annual income of 'Bayleys' aforesaid, and the dividends or annual income of the securities for the time being representing the proceeds of the sale thereof or of any part thereof in such proportions and generally in such manner as to my said trustees in their absolute discretion shall seem best for the support of my son William Charles Arlington Blew and his wife and children, or any of them, or to accumulate the same or any part thereof at their like discretion for the benefit of the children of my said son who shall become entitled to the capital of 'Bayleys' under the trust hereinafter contained; and subject to such discretionary trust I direct my said trustees to pay the said net annual income and the dividends or annual income aforesaid to my said son during his life, and from and after his decease to his widow (if any) during her life and so long as she shall remain his widow, and from and after the death of the survivor of them, or the re-marriage of his widow, I declare that my said trustees shall stand possessed of 'Bayleys' aforesaid and of the securities and investments by which the proceeds of sale thereof or any part thereof may for the time being be represented, as well the capital as the income, upon trust for the child or children of my said son who being sons attain the age of twenty-one years or being daughters attain that age or marry under it, if more than one in equal shares as tenants in common."

The testator died on December 27, 1894.

William Charles Arlington Blew married Martha Blew on March 1, 1883, and died on June 28, 1904, leaving his widow and an only son, William Walker Humphreyson Blew, who was born September 7, 1883, and attained his majority on September 6, 1904.

Martha Blew had not remarried.

On October 6, 1905, Martha Blew and W. W. H. Blew, claiming to be sole beneficiaries, signed a request to the present trustees of the will to hand over the fund representing the proceeds of the sale of "Bayleys," which had been sold, to their nominees.

WARRINGTON J.
1906
BLEW, *In re.* BLEW v. GUNNER.

W. W. H. Blew had recently mortgaged his reversionary interest under the will to the Century Insurance Company, Limited, as security for a loan.

The present summons was taken out by Martha Blew and W. W. H. Blew against the present trustees of the will and the Century Insurance Company, Limited, for the determination of the question whether, upon the plaintiffs executing (if necessary) a proper release, and subject to the payment of the costs, charges and expenses of the defendant trustees and any death duties (if any) for which they might remain liable, the defendant trustees were bound at the request of the plaintiffs and the defendant company to transfer the property now representing the proceeds of the sale of "Bayleys," and the accumulations of income thereof respectively in their hands or under their control into the joint names of the plaintiffs' nominees.

Norton, K.C., and *Van Neck*, for the plaintiffs. On the construction of the will it is submitted that the discretionary trust for maintenance is limited to the lifetime of W. C. A. Blew, and therefore came to an end on his death. If, however, that construction is not the right one and the trust is not so limited, it is void for remoteness. A discretionary trust cannot be limited for a longer period than a life or lives in being and twenty-one years afterwards. If that period is exceeded the whole trust is void.

In re Wise (1), on which the defendants will no doubt rely, was, it is submitted, wrongly decided. In that case North J. purported to follow *Gooding* v. *Read* (2), but was misled by the erroneous head-note to the report of that case. There the discretionary trust for maintenance was for the children equally, but the word "equally" is omitted in the head-note to the report. In *In re Watson* (3), in which Chitty J. arrived at a similar conclusion to that of North J., the will is very shortly stated in the report, and it is quite possible that the word "equally" appeared in the trust for maintenance, or that, as the income was directed to be paid to guardians, the learned

(1) [1896] 1 Ch. 281. (2) 4 D. M. & G. 510.
(3) [1892] W. N. 192.

judge held that the trust for maintenance was confined to minority. Neither of those cases, therefore, can be relied on.

Howland Jackson, for the Century Insurance Company, supported the same view.

Rowden, K.C., and *Gordon Fellowes*, for the trustees. Whether or not the discretionary trust is by implication limited to the life of the husband is a pure question of construction. There is no express limit of time fixed by the will for its duration, but it is said that by implication the words "during the life of my son" ought to be inserted, and that the use of the word "wife" —which, we submit, is confined to the wife who was the wife to whom W. C. A. Blew was married at the date of the will—in the trust points to its being limited to his life. But obviously the trust was still to be exercised if the wife survived him. The testator intended that during the life of W. C. A. Blew the wife was to be the object of the trust, therefore he must call her "wife." It is a strong thing to imply words in a will which the testator has not used. On the fair construction of the will it is submitted that the discretionary trust is limited to the lives of the husband and wife and the life of the survivor; but if it is not so limited, it is not void. The case falls within *In re Wise* (1), where a similar trust for maintenance was held valid.

[WARRINGTON J. In that case the judge does not give his own opinion, but follows *Gooding* v. *Read*. (2) When, however, that case is looked at, it will be seen that the provisions of the will are different. There was there no discretion as to maintenance vested in the trustees, and it seems to have been taken for granted that the trust for maintenance, taken by itself, was valid.]

In re Wise (1) does not appear to be doubted by Mr. Theobald: see Theobald on Wills, 6th ed. p. 580. By analogy to the case of a power, if the trust includes objects which are not within the limits allowed by law, the trust is not void for remoteness, for those objects may be selected which come within those limits: Farwell on Powers, 2nd ed. pp. 114, 115; *In re Veale's Trusts*. (3)

Norton, K.C., in reply. The cases on powers do not apply.

(1) [1896] 1 Ch. 281. (2) 4 D. M. & G. 510.
(3) (1876) 4 Ch. D. 61.

WARRINGTON J.

1906

BLEW *In re.* BLEW *v.* GUNNER.

A discretionary trust, to be good, must be exercisable only within the limits of the rule against perpetuities. A discretionary trust which may be exercisable on too remote an event is void on its creation.

WARRINGTON J. The question in this case is whether a certain discretionary trust for maintenance contained in the will of William John Blew is still exercisable by the trustees or not. [His Lordship stated the facts, and continued:—] Now it is said, in the first place, that on the construction of the will the discretionary trust is confined to the life of W. C. A. Blew. The trust is to apply the income "for the support of my son W. C. A. Blew and his wife and children or any of them." It is contended that that trust is limited to the life of W. C. A. Blew by reason of the use of the word "wife" shewing that the very object of the power is to be the person who, while the power is exercisable, fulfils the description of the wife of W. C. A. Blew, and therefore that the power is not exercisable after the death of W. C. A. Blew when the person who had been his wife would not be properly so described. Support is given to this contention by the trusts of the income subject to the discretionary trust, in which the testator refers, not to the wife, but to the widow of his son when he is referring to her after the death of his son. On the whole I think, on the construction of the trust, that the plaintiffs are right, and that this trust is limited to the life of W. C. A. Blew. That is my view of the construction, but, of course, anybody else might take a different view.

It has, however, been argued that if that view is not the correct one, and that if the trust continues beyond the life of W. C. A. Blew, it is void for remoteness. I think, therefore, it is desirable to see whether that is so or not. In the first place, how long is the trust to continue? If it is not limited to the life of W. C. A. Blew, plainly I think it must continue during the lives of all his children and the life of the survivor of them. It is "for the support of my son W. C. A. Blew and his wife and children or any of them." It seems to me that if that is the true construction of the trust it would be exercisable so long as any child of W. C. A. Blew is living. If that is so, it is necessary

to see whether that would involve a breach of the rule against perpetuities. In that view of it the trust might continue for a period exceeding twenty-one years after the death of W. C. A. Blew. It would be exercisable during the life of any child of W. C. A. Blew whose life might last more than twenty-one years after the death of W. C. A. Blew. That is quite clear. Accordingly it is a trust which might be exercisable at a time beyond the period allowed by the rule against perpetuities. It might further be exercised in regard to yearly or half-yearly payments of income, that is to say, in respect of a fund which might not come into existence until more than twenty-one years after the death of W. C. A. Blew. Further, with regard to the shares into which that fund would be distributable, those shares might not be ascertainable until more than twenty-one years after the death of W. C. A. Blew, and the persons who were to benefit by the exercise of the power might not be ascertained or ascertainable until more than twenty-one years after the death of W. C. A. Blew. It seems to me, therefore, on these considerations that the trust, assuming the construction which would not confine it to the lifetime of W. C. A. Blew is the correct one, would be one which would infringe the rule against perpetuities. So far I have dealt with the matter independently of authority.

But it is said that *In re Wise* (1) is a case directly in point and against the view that I have expressed. It is quite true that the decision in that case is directly in point. The testator there bequeathed to trustees the residue of his personal estate, upon trust for investment and to apply the whole income, or such part thereof as his trustees or trustee for the time being in their absolute discretion should think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of the testator's sister, until they should respectively attain the age of twenty-three, and to accumulate and invest as capital any unapplied portion of the income. Then there was a trust of the capital and income of investments for the children of the testator's sister who should attain twenty-three, which was void as infringing the rule against perpetuities. It was there contended that

(1) [1896] 1 Ch. 281.

WARRINGTON J.
1906
BLEW, *In re.*
BLEW v. GUNNER.

the trust for the application of the fund for maintenance was separable from the trust of the capital and was not void as infringing the rule against perpetuities. The only point with which the learned judge dealt in his judgment was whether that trust for maintenance was separable. It was not argued that, if it was separable, it was void as infringing the rule against perpetuities. It was contended on behalf of the plaintiffs that the trust for maintenance out of the income could be separated from the gift of the capital, which had been held void for remoteness, and was perfectly valid; that it was an immediate gift, and was at any rate valid for the period of twenty-one years from the death of the testator, and for that *Gooding* v. *Read* (1) and *In re Watson* (2) were cited. The learned judge, in giving his decision, said (3): "As regards the question of construction, I thought on reading the will that it was reasonably clear that the trust for the maintenance out of the income of a fund up to the age of twenty-three of persons who are described was an entirely different and separate trust from the trust of the capital of the fund for the same persons on their attaining the age of twenty-three. And two cases have been cited which shew that my opinion, arrived at independently on this will, is identical with the view which has been taken by the Court in other similar cases. One of those cases, *Gooding* v. *Read* (1), in the Court of Appeal, was very like the present case; and the other, *In re Watson* (2), before Chitty J., was even stronger. In my opinion, therefore, this trust for maintenance is good." The learned judge, therefore, finding that the trust for maintenance was separable, said that in his opinion the trust was good. He did not discuss, nor was it discussed before him as it was discussed before me, whether, assuming the trust to be separable, there was anything in it, taking it as a separate trust, to infringe the rule against perpetuities.

I cannot help thinking that the learned judge was misled by the head-note in *Gooding* v. *Read* (1), which is clearly inaccurate. It is this: "A testator devised lands upon trust to pay the rents and profits to a tenant for life, and, after her decease and until

(1) 4 D. M. & G. 510. (2) [1892] W. N. 192.
(3) [1896] 1 Ch. 285.

her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and, on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead:—Held, that the trust for maintenance was separable from the rest, and was not bad for remoteness, whether the trust for sale was so or not." There, as in *In re Wise* (1), the gift of the capital was void for remoteness, and from the head-note it would appear that the trust for maintenance was actually the same as we have here, namely, for all or any of the children; and if I am right in the conclusion to which I have come as to the true effect of this will, the trust for maintenance in that case, as stated in the head-note, would also have been void for remoteness. But when one comes to look at the quotation from the will in *Gooding* v. *Read* (2) it is seen that the head-note is inaccurate. The trust for maintenance, as stated in the body of the report, is this: "To pay and apply such rents, issues, and profits *equally* to or for the benefit of the children of my said daughter living at her decease until the youngest of such children shall have attained the age of twenty-five years." That was, therefore, simply a gift of life interests to each of the children in equal shares until the youngest attained twenty-five. There was no discretion given to the trustees as to the application of the fund. It was simply a trust to apply the income in equal shares, and there was obviously nothing infringing the rule against perpetuities. The Lords Justices gave no reasons in their judgments, but merely said that in their opinion the good was separable from the bad, if bad there was, that is to say, that the trust for maintenance in equal shares was good and was separable from the bad. I cannot help thinking that when that case was cited to North J. he read the head-note only, and, the case being cited to him only on the question as to whether the trust was separable or not, his attention was not drawn to the fact that the question of infringement of the rule against perpetuities never really arose as to the trust of the income in that case, although it did arise in the case before him. It seems to me, therefore, that I am

(1) [1896] 1 Ch. 281. (2) 4 D. M. & G. 510.

WARRINGTON J.
1906
BLEW, *In re.*
BLEW *v.* GUNNER.

not compelled to decide the present case on the footing that I am bound by *In re Wise.* (1)

Then there is the case of *In re Watson* (2), which is very unsatisfactory because no reasons for the judgment are given in the report. There a testator devised his real estate to trustees upon trust for sale, and to invest 3000*l.* and pay the income to his wife for life, and after her death to hold the same in trust for all the children, or any the child of his son George who should attain the age of twenty-four years share and share alike, with benefit of survivorship in case any should die under that age or without issue. There, be it observed, the trust was for all the children who should attain twenty-four and in equal shares, which is the material point. That trust was of course void for remoteness. Then there was a direction that the trustees should, after the death of his wife, apply the whole, or such part as they should in their discretion think fit, of the income of the 3000*l.* for or towards the maintenance or education of all or any of such children. It was held that the gift of the 3000*l.* to the children of George was void for remoteness, but that the maintenance clause was separable from the rest of the gift and was valid, and that such of the children only who were under twenty-one took the benefit of that trust; and it was stated that *Gooding* v. *Read* (3) was followed. There, again, one does not know what were the other provisions of the will, or what were the reasons of the learned judge. All one knows is that *Gooding* v. *Read* (3), with the defect I have mentioned, was cited to the learned judge and was followed by him. It seems to me, therefore, that neither *In re Watson* (2) nor *In re Wise* (1) is a satisfactory authority upon which to act, and that I must therefore follow my own view, which is that the trust for maintenance in the present case is altogether void for remoteness. The result is that it is not now exercisable, and that the widow and child take absolutely.

Solicitors: *Wingfield & Blew; Munby & Nevile; Fladgate & Co.*

(1) [1896] 1 Ch. 281. (2) [1892] W. N. 192.
(3) 4 D. M. & G. 510.

W. I. C.

DAWSON *v.* ISLE.

WARRINGTON J.

1906

March 6, 7.

[1905 D. 686.]

Bill of Exchange—Book Debt—Receivable Bill—Bill delivered to Bankers to be discounted—Property in Bill—Indorsement.

By an agreement of February 27, 1905, the plaintiff agreed to sell, and the defendant to purchase, certain shares in a company at a price to be ascertained as thereby provided, including a condition that book debts due to the company should be taken as good at the amounts standing in the company's books. The company received in the ordinary course of business a bill of exchange, which was properly accounted for in their books, and on February 22, 1905, handed it to their bankers to be discounted. On February 28 the bankers credited the company's account with the amount of the bill:—

Held, following *In re Stevens*, [1888] W. N. 110, 116, that the bill, being entered in the books of the company as a receivable bill, was a book debt; that, inasmuch as it had been handed to the bankers for discount, but had not actually been discounted, it was on February 27 a debt due to the company; and that it must be accounted for as a book debt in ascertaining the amount of the price to be paid for the shares.

Special Case.

By an agreement of February 27, 1905, the plaintiff agreed to sell, and the defendant to buy, certain shares in the Meersbrook Tannery, Limited. The purchase price was fixed by very special provisions; the freehold premises and machinery of the company were to be taken at 11,500*l.*, to which were to be added the value of the hides belonging to the company, to be ascertained in a manner thereby provided; tanning liquors to be taken at 1000*l.*; unused tanning material at cost price; and book debts. Clause 1 (*e*) was as follows: "The amount of the book debts due to the company (less the discounts), such debts to be taken as good at the amounts standing in the company's books, with the exception of bad debts due from former tenants. . . . ."

From the total of these items others were to be deducted, and the purchase price was to be the balance of the amounts thus ascertained.

WARRINGTON J.
1906
DAWSON v. ISLE.

Disputes arose; the plaintiff brought an action for specific performance of the agreement; and Buckley J., on July 31, 1905, held that cash at the company's bankers and cash in hand were not to be taken into account as book debts. The other matters in dispute were referred to an arbitrator. The proceedings were continued before the arbitrator, and he eventually stated a special case for the opinion of the Court on three questions. The material facts relating to the only question which calls for a report were set out as follows:—

"The plaintiff has sought to bring into account as part of the book debts due to the company in ascertaining the purchase-money payable to him by the defendant a bill of exchange for 600*l.*, which the company received from the Sheffield Leather Company, who were debtors to the company in the ordinary way of trade for goods sold and delivered.

"This bill of exchange was received by the company in the ordinary course of trade, and was on February 22, 1905, handed to its bankers with a sum of cash amounting to 16*l.* 13*s.* 11*d.* It was the custom of the company in the ordinary course of its business to hand its bankers bills of exchange received from its customers and for its bankers to discount them. The 16*l.* 13*s.* 11*d.* was given credit for by the bankers on February 23, 1905, and on February 28, 1905, the said bankers credited the company's account in their bank pass-book with the amount of the bill, and debited the company's said account on the same date with the discounting charges. On February 27, 1905, the said bill of exchange had been properly accounted for in the books of the company. On February 27, 1905, the company's bankers had discounted in the ordinary course of its dealings with the company bills of exchange which were then current to the face value of 3700*l.* The defendant claims that the said bill of exchange for 600*l.* was either cash in hand or at its bankers, and according to the said order is not to be taken into account as book debts at all."

The question was whether the bill for 600*l.* ought to be treated for the purposes of the agreement as a book debt standing in the books of the company, and brought into account in ascertaining

the amount of the purchase-money, or as part of the bank balance to the credit of the company's account on February 27, 1905, which, by the order of Buckley J., was not to be included in the book debts.

Cave, K.C., *T. Hollis Walker*, and *C. E. Dyer*, for the plaintiff. This bill must be treated as a book debt due to the company. Book debts are such debts accruing in the ordinary course of trade as are usually entered in the trade books, whether they are in fact so entered or not: *Shipley* v. *Marshall* (1); *Official Receiver* v. *Tailby*. (2) The arbitrator says that this bill was properly entered in the books of the company; so it would appear in the books not only to the credit of the customer who drew it, but also in the bills receivable book as a bill receivable by the company. It is, therefore, a book debt within *In re Stevens* (3), where it was held that bills receivable were book debts.

It was a book debt due to the company on February 27. The amount of the bill had not then been credited to the company's account; therefore the bill still belonged to them: *Giles* v. *Perkins*. (4) Bills in the hands of a banker remain the property of the customer until they are negotiated: *Bolton* v. *Puller*. (5) In *Ex parte Schofield* (6) money had actually been advanced on the bills, so the decision that the property in them had passed to the bank does not affect this case. This bill was therefore on February 27 a book debt due to the company within the words of the agreement, and must be accounted for.

H. Terrell, K.C., and *J. W. Greig*, for the defendant. Under this agreement part only of the assets of the company are bought, and the question is one of construction, viz., whether this bill is a book debt within the meaning of the agreement. We are not buying the book debts generally, but the book debts actually standing in the company's books. *Shipley* v. *Marshall* (1) was only a decision on the meaning of "book debts" in the

(1) (1863) 14 C. B. (N.S.) 566.
(2) (1886) 18 Q. B. D. 25, 29.
(3) [1888] W. N. 110, 116.
(4) (1807) 9 East, 12.
(5) (1796) 1 Bos. & P. 539, 546.
(6) (1879) 12 Ch. D. 337.

WARRINGTON J. 1906 DAWSON v. ISLE.

Bankruptcy Act of 1861. On February 27 this bill no longer belonged to the company; the property in it had passed to the bankers: *Ex parte Schofield.* (1) When this bill was given to the company and the receipt of it entered in their books the debt in respect of which it was given was gone unless and until the bill was dishonoured; so there was no debt. That the bill was also entered as receivable would not make it a debt. If it was indorsed generally and handed to the bank for discount the company could no longer sue on it. It was not a debt due to them. They might possibly be able to recover the bill from the bank in trover: *Giles* v. *Perkins* (2); but that would not make it a debt. If it was specially indorsed they would have to get the bank to re-indorse it to them; so it would not be their debt. A bill of exchange is a negotiable instrument, and the whole property passes to the indorsee: *Collins* v. *Martin.* (3) *Bolton* v. *Puller* (4) is in our favour on this point.

Cave, K.C., in reply. The property did not pass to the bank. The bill was handed to them for a special purpose, and they would have had to return it to the company if they did not discount it: s. 21, sub-s. 1, of the Bills of Exchange Act, 1882; *Bell* v. *Lord Ingestre.* (5) Till the bill was discounted the books of the company ought to shew that it belonged to the company.

WARRINGTON J. stated the facts, and continued:—The plaintiff says the bill comes within the order or declaration of Buckley J. as to bank accounts or cash in hand. Now, is that the right view? Let us see how this bill would properly stand in the books of the company. In the special case it is said that the bill was properly accounted for. In the first place, it would appear in the books of the company in the ledger account of the customer. In that ledger account the bill is credited, of course, to the customer. So far that puts an end to the debt in the ledger, but the bill would further be accounted for, if it were properly accounted for in the books of the company, by being

(1) 12 Ch. D. 337.
(2) 9 East, 12.
(3) (1797) 1 Bos. & P. 648.
(4) 1 Bos. & P. 539.
(5) (1848) 12 Q. B. 317.

entered in the bills receivable book; and it has been decided in a case which is only reported in the Weekly Notes—the case of *In re Stevens* (1)—that bills receivable entered in the bills receivable book are bills which ought to be treated as book debts. I take it that a bill receivable becomes a book debt in substitution for the ledger account in respect of which it has been credited. Prior to the date of February 27—the important date—the bill, according to the special case, had been handed to the bankers, and I must assume from the custom stated that it had been handed to the bankers for the purpose of being discounted, but it had not at the moment, namely, on February 27, been discounted. Now, what was the position at that moment? Was that bill then owing a debt due to the company, or was it a debt due to the bank? It is on that that the whole question turns. I think that is governed by the case of *Giles* v. *Perkins* (2), which was referred to by Mr. Cave. The head-note there is this: "A customer paying bills, not due, into his bankers' in the country, whose custom it was to credit their customers for the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account independent of such bills being in his favour at the time of the bankruptcy: and if payment be afterwards received upon such bills by the assignees" —now called trustees in bankruptcy—"they are liable to refund it to the customer in an action for money had and received." Therefore I think the point there was not merely whether the bill—the piece of paper—could be recovered in trover, but whether the money could be recovered as money had and received. Lord Ellenborough says this (3): "Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn,

(1) [1888] W. N. 110, 116. (2) 9 East, 12.
(3) 9 East, at p. 14.

WARRINGTON J.

1906

DAWSON v. ISLE.

has a lien on the bill deposited with him, though not indorsed; whereas the country banker who always takes the bill indorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs."

Now in this case it is not stated in the special case whether the bill was indorsed or not; but I will assume for the moment it was indorsed. The bill was indorsed for the purpose (taking the custom to have been as stated) of being discounted. When discounted, then, according to Lord Ellenborough, it became the property of the bankers, but until it was discounted it was not the property of the bankers. I think I must take it that this bill was handed to the banker conditionally, and for the purpose of its being discounted. If that is correct, the money due on the bill was within that decision a debt owing to the company. It was a book debt according to the decision in *In re Stevens* (1), and if a book debt, then the amount of it is to be taken into account in ascertaining this purchase price. But it is said that a decision in accordance with that view would be in the teeth of the decision of the Court of Appeal in the case of *Ex parte Schofield*. (2) That was a bankruptcy case, and the facts are stated in the head-note as follows: "Bills of exchange indorsed by a customer to his banker in order that they may be discounted, and held by the banker 'pending discount,' i.e., pending inquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities, which the banker, in proving in the customer's bankruptcy for the amount due to him by the customer, is bound to value." Now, the point made on behalf of the defendant in reference to that case was this—it was said that it decided that by the indorsement the bill became the property of the banker, and that, therefore, I must hold that by the indorsement in this case the bill became the property of the bankers; but when that case is really examined I think it will be found that the question whether the bill became the property

(1) [1888] W. N. 110, 116. (2) 12 Ch. D. 337.

of the banker or not was never in question at all. The bill became the property of the banker, but the question was whether he held it as security only, or as his own property so that he could prove against the bankrupt's estate for the value on the bill. The passage most relied on in the judgment, and which struck me as carrying the defendant in this case, is this. The Chief Judge in Bankruptcy says (1): "Mr. De Gex says that a creditor cannot take a part of the whole, and the whole of a part of the estate. No doubt that is so; it is fundamental doctrine. But in order to apply it you must make out that it"—that is, what the creditor claims to take—"is a part of the bankrupt's estate. In my opinion these bills are no part of the estate. A man indorses a bill of exchange to his banker, and says, 'I owe you a good deal of money; you can collect these bills for me and carry them to my account.' Those bills no longer remain part of the customer's estate, so as to deprive the banker of the full title in law and equity which arises out of such transactions between bankers and their customers." It seems to me the whole point was that the bill was not indorsed to the bank merely for the purpose of collection; it was indorsed to the bank for the purpose of being credited against money which the customer owed to the bank, and that point seems to me to distinguish it from the judgment of Lord Ellenborough in the case of *Giles* v. *Perkins* (2), and to distinguish it from the present case.

In my opinion in the present case the indorsement was really within s. 21, sub-s. 1, of the Bills of Exchange Act and *Bell* v. *Lord Ingestre*. (3) It was in reality not an absolute indorsement intended to pass the property to the bankers at the moment, but an indorsement which was intended to enable them to discount the bill, and when they discounted the bill then to pass the property; and it seems to me that until discounted the property in the bill did not actually pass to the bankers, and that the debt remained owing to the company. If so, and if it was properly accounted for, as it is said to have been by the special case, in the books of the company, then it remained a book debt

(1) 12 Ch. D. 342. (2) 9 East, 12.
(3) 12 Q. B. 317.

WARRINGTON J.
1906
DAWSON v. ISLE.

of the company, and the amount of it ought to be taken into account by the arbitrator.

Solicitors: *Andrew, Wood, Purves & Sutton, for Andrew & Thompson, Lincoln; Miller & Smiths, for Clitherow & Son, Horncastle.*

H. C. R.

WARRINGTON J.
1906
March 13, 20.

In re AFRICAN FARMS, LIMITED.

[0036 of 1906.]

Company—Winding-up—Petition—Evidence in Support—Statutory Affidavit — Defect or Irregularity — Companies (Winding-up) Rules, 1903, *rr.* 29, 200.

Rule 29 of the Companies (Winding-up) Rules, 1903, which provides that a petition for winding up a company shall be verified by an affidavit made by the petitioner, is merely directory as to the kind of affidavit to be accepted as prima facie evidence of the statements in the petition. The Court will therefore, in a proper case, accept the affidavit of the petitioner's attorney or agent, particularly where it is satisfied that the material facts are more within the knowledge of the deponent than of the petitioner himself.

In re Charterland Stores and Trading Co., [1900] 2 Ch. 870, dissented from.

A PETITION praying that the South African Farms, Limited, might be ordered to be wound up by the Court was presented by Harry Blashfield Ramsey, a judgment creditor of the company for 81*l.* 6*s.* 8*d.* in respect of arrears of salary and 8*l.* costs.

The petitioner was the assistant manager of the company at its farm, Fort Klipdam, Pietersburg, South Africa, under a five years' agreement from August, 1904, and when the petition was presented he was absent in South Africa.

The affidavit filed in verification of the petition was made by Arthur Walter Ramsey, of 4, Overbury Avenue, Beckenham, in the county of Kent, stockbroker, as the duly authorized attorney or agent of the petitioner.

J. M. Gover, in support of the petition.

Peterson, for the company. There is a preliminary point that the petitioner has not personally sworn the affidavit in verification

of the petition as required by r. 29 of the Companies (Winding-up) Rules, 1903. An affidavit by an attorney or other person is not a compliance with that rule: *In re Charterland Stores and Trading Co.* (1)

In re Carrara Marble Co. (2), in which the Court allowed the statutory affidavit to be made by a clerk to the solicitors acting for the petitioners, is very shortly reported, and it does not appear from the report that the point was argued.

In re Brandy Distillers Co. (3) does not apply. There the petition was presented by the Attorney-General on behalf of the Crown, and the Companies (Winding-up) Rules are not binding on the Crown.

J. M. Gover, for the petition. The present case is distinguishable from *In re Charterland Stores and Trading Co.* (1) There the persons making the affidavit had no knowledge of the facts. Here the facts stated in the petition are known to the attorney and would not be known to the petitioner. In such a case the Court will accept the affidavit of the attorney as a sufficient compliance with r. 29: *In re Fortune Copper Mining Co.* (4)

[He was stopped.]

WARRINGTON J. The question arises on r. 29 of the Companies (Winding-up) Rules, 1903, which provides that "Every petition for the winding up of a company by the Court, or subject to the supervision of the Court, shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition." The objection taken on behalf of the company in this case is that the affidavit verifying the petition is made by the attorney or agent of the petitioner, and not by the petitioner himself, who, in fact, is resident in South Africa. It is plain here that the attorney knows the material facts and

(1) [1900] 2 Ch. 870.
(2) [1896] W. N. 87.
(3) [1901] W. N. 37.
(4) (1870) L. R. 10 Eq. 390.

WARRINGTON J.

1906

AFRICAN FARMS, LIMITED, *In re.*

that the petitioner does not, and therefore that the attorney's evidence is of more value than that of the petitioner. I should have had no hesitation in accepting the attorney's affidavit but for the decision of Wright J. in *In re Charterland Stores and Trading Co.* (1), in which a similar objection was taken to the objection taken in this case. There Wright J. refused to accept an affidavit made otherwise than by the petitioner personally, and considered that the case was not within the scope of r. 177 of the Companies (Winding-up) Rules, 1890 (which is to the same effect as r. 200 of the Companies (Winding-up) Rules, 1903), as involving merely a "formal defect" or "irregularity."

I have looked into the practice, and have ascertained that there have been many cases, some of which are unreported, in which an affidavit other than that of the petitioner has been accepted. I have also spoken respecting the matter to Buckley J., to whom the company business has been assigned. He has pointed out to me, and I in turn now desire to point out, that r. 29 does not state what is to be the result of non-compliance with its provisions. The rule does not say that the petition is in that case to fail. The rule is merely directory as to the kind of affidavit to be accepted as evidence. That leaves it open to the Court, in a proper case, to accept an affidavit which in an ordinary case coming before the Court would be accepted as sufficient evidence. I have already said that in this case the affidavit in question is of more value than that of the petitioner, and therefore, on the principle I have mentioned, I accept that affidavit as a sufficient compliance with r. 29. I therefore overrule the preliminary objection.

Solicitors for the petitioner: *F. Kimber Bull & Duncan.*
Solicitors for the company: *Whitehouse & Co.*

(1) [1900] 2 Ch. 870.

W. I. C.

ATTORNEY-GENERAL *v.* MANCHESTER CORPORATION.

FARWELL J.

1906

Jan. 29, 30; Feb. 5.

[1905 A. 657.]

Municipal Corporation—Statutory Powers—Corporation by Charter—General Powers—Tramways—Power to use Tramways for the Purpose of conveying and delivering Parcels—Ultra Vires—Ancillary Business—Business of Common Carriers—Manchester Corporation Tramways Act, 1899 (62 & 63 *Vict. c. cclix.*)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50).

By virtue of various provisional orders and private Acts of Parliament the Manchester Corporation had power to use all tramways belonging to or in lease to the corporation, or on which they had power to place or run carriages, "for the purpose of conveying and delivering animals, goods, minerals, or parcels." The corporation worked a large system of tramways, of which they were owners or lessees, extending all over the city and suburbs of Manchester and a considerable surrounding district. They had commenced, or advertised their intention to commence, a general parcels delivery business within and beyond the area covered by their tramways, not confined to parcels and goods carried on their tramways. This action was brought by the Attorney-General, on the relation of Manchester ratepayers, to restrain the carrying on of such a business:—

Held that, under the power given by the Act of 1899, the corporation had power to carry on the business of common carriers upon their tramways, and as ancillary to that business to do all things necessary for the collection and delivery of parcels carried on their tramways. For this purpose they had power to maintain stations or warehouses for receiving and storing parcels or goods, to provide horses, vans, carts, and to employ servants, messengers, and agents for the purposes of collection and delivery. But all these services must be confined to parcels or goods carried or to be carried on the tramways; the corporation had no power to carry on a general parcels delivery business apart from their tramways.

Held, also, that the part of the general business which was in excess of the statutory powers of the corporation must cause some expense to the city funds, and therefore the corporation were prevented by the Municipal Corporations Act, 1882, from carrying it on under their general powers as a corporation by charter.

THIS was an action brought by the Attorney-General on the relation of a firm of Manchester ratepayers, who carried on a large business as carriers in Manchester and the surrounding districts, against the Corporation of Manchester, asking for a declaration that the defendants had no power to convey, collect,

FARWELL J. 1906 ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

or deliver for reward any goods or parcels otherwise than by the tramways comprised in their tramway undertaking, or to act as general carriers, or as parcels delivery, general forwarding, or railway agents, or to undertake the collection of the value of goods on delivery, and that it was unlawful to expend any part of the city fund or the receipts of their tramway undertaking, or the proceeds of any rate for any of the purposes aforesaid; and for an injunction in the terms of the declaration.

The defendants had constructed and were working a number of tramways in and near the city of Manchester, and had leased or taken over tramways constructed by private companies in the surrounding districts. As a result their tramway undertaking comprised a network of tramways covering the whole of the city and suburbs of Manchester and many neighbouring towns.

The defendants had organized and commenced to carry on a very extensive system of parcels delivery. They had provided central depots for the receipt and delivery of parcels, and established a number of agencies for receiving parcels, and provided a number of horses, vans, hand-carts, and messengers for the collection and delivery of parcels. They had in connection with this system done, or advertised their intention to do, the following things which were alleged to be ultra vires: (*a*) Collected parcels from, and delivered them to, places outside, and in some cases four miles outside, the radius of their tramways; (*b*) carried parcels between places both of which were outside the radius of the tramways; (*c*) carried and delivered by their vans and messengers, within the radius of their tramways, parcels which were never carried on any part of their tramways; (*d*) delivered parcels by express messengers; (*e*) acted as general agents for all railway companies having stations in Manchester, and delivered parcels to the companies for carriage to all parts of the kingdom and abroad; (*f*) collected the railway companies' charges for these parcels and paid them to the companies, deducting a fixed charge per parcel for collection; (*g*) accepted "cash on delivery" parcels, i.e., parcels for which they collected on delivery the price or other payments due to the consignors; (*h*) insured parcels; (*i*) made charges for these services in excess of the tolls fixed by their Acts.

All the expenses incurred in respect of the parcels delivery business were charged to the tramways undertaking of the corporation.

Reports had been presented to the corporation by their officers which estimated the cost of the proposed parcels delivery business at 18,000*l.* a year, and shewing a profit of 1500*l.*, calculated on the basis of 5000 parcels a day at an average of 3*d.* a parcel. It appeared that the number of parcels carried had never been nearly so numerous, nor had an average price of 3*d.* been obtained.

No evidence was produced by the corporation as to what they had actually done, but it appeared from their answers to interrogatories, admissions, and advertisements that they had done or intended to do all the things complained of. They contended that all their acts were authorized by their various tramway Acts and orders as part of or ancillary to the business authorized thereby; or, if not fully authorized thereby, were within their powers as a corporation created by charter.

The provisions as to tramways on which the argument chiefly turned were those of a provisional order confirmed by an Act of 1875 and the Manchester Corporation Tramways Act 1899. (1) Several other provisional orders and private Acts were

(1) The provisional order confirmed by the Act of 1875 (38 & 39 Vict. c. clxvii.) gave powers to the corporation (s. 6) to construct and maintain the tramways therein described with all proper rails, plates, offices, weighbridges, stables, carriage houses, warehouses, works, and conveniences connected therewith or for the purposes thereof, and to work and use the same. Sect. 14 provided: "The tramways may be used for the purpose of conveying passengers, animals, goods, minerals, and parcels"; and s. 17 provided: "The promoters may demand and take for all animals, goods, minerals, and parcels conveyed upon the tramways any tolls not exceeding the rates per mile specified in the schedule."

The Manchester Corporation Tramways Act, 1899 (62 & 63 Vict. c. cclv.), s. 8, empowered the corporation to work all tramways owned by or in lease to them to provide "all such buildings, cars, rolling stock, engines, machinery, electric and other plant, apparatus and appliances, horses and stables, as they may deem requisite or convenient for the working or user by the corporation of such tramways by animal or mechanical power."

Sect. 22 provided: "Notwithstanding anything contained in any other Act or order relating to any tramways for the time being belonging or in lease to the corporation or on which they have power to place or run carriages such tramways may

FARWELL J. 1906 ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

referred to, but the Court held they did not extend the powers given by the above-mentioned Act and order.

A good deal of argument was occupied with the Manchester Southern Tramways Act, 1903 (3 Edw. 7, c. cxciii.), which was said to contain wider powers.

This was an Act incorporating a company to construct and work certain tramways. Power was given by the Act to the local authorities, and in their default to the Manchester Corporation, to take over the powers of the Act. It was stated that all the tramways were being constructed by the defendants, who had either taken over the powers or taken the lines on lease from the local authorities. The defendants, however, failed to produce proper evidence that the notices required by the Act had been given. The defendants argued that on the true construction of the Act the powers it contained were extended to the whole of the corporation's tramways undertaking; but this argument was rejected by the judge, and, as it turned upon the special wording of an unusual clause, it has not been thought necessary to report it.

Upjohn, K.C., *Montague Lush, K.C.*, and *S. A. T. Rowlatt*, for the plaintiff. The corporation have taken advantage of the very limited power of carrying parcels given them by their tramways Acts to set up a general parcels delivery business quite apart from their tramways. They have established a central depot, and a system of collecting agencies all over Manchester and the districts round it extending four miles beyond the outside radius of their tramways. They have even advertised their readiness to send parcels to any part of the world. That is far beyond anything which can be justified under any statutory authority which the corporation possess.

The dealing with parcels which are not carried on the tramways at all, the making themselves general agents of the railway companies, undertaking to collect on delivery cash

---

be used for the purpose of conveying and delivering animals, goods, minerals, or parcels."

And the Act contained provisions as to charges and tolls similar to those contained in the provisional order of 1875.

payments for parcels, and to send parcels by special messengers are clearly outside their power. The charge of special fees for these services over and above the statutory rates is clearly improper. Moreover, they have no power to deliver even the parcels they carry on their tramways at a distance from the point where they leave the tramcars. They can only keep the parcels until the persons to whom they are consigned fetch them. They may be entitled to construct depots near their tramways for the purpose of keeping the parcels till called for, but that is the most they can do.

One of the defences raised is that the defendants are entitled to do what they have done under their general powers as a corporation at common law. But any municipal corporation can be restrained from applying any part of its borough fund or money raised by rates to any objects not authorized by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50): *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (1); and this object is clearly not within that Act.

It is suggested that the corporation have not expended any money on such of the purposes aforesaid as are not authorized by their Acts. But it is proved that large sums of money have been spent on depots for parcels and vans, horses, and servants for distribution generally. Some part of this expenditure must be attributable to the unauthorized purposes.

The defendants contend that there is no charge upon the rates, because they only use the same vans, horses, and servants as are used for collection and delivery of parcels which are carried on the tramway. The same argument was used and failed in *Attorney-General* v. *London County Council.* (2)

Balfour Browne, K.C., Macmorran, K.C., and *Hugh F. Moulton*, for the defendants. All that the corporation have done is properly incidental or ancillary to the business which they have statutory power to carry on, viz., the business of carrying parcels on their tramways. Their Acts, or some of them, give express power to deliver, but it is implied without that. The power to do anything in all cases carries with it the power of doing anything reasonably ancillary to it. The defendants have

(1) (1889) 23 Q. B. D. 492. (2) [1901] 1 Ch. 781.

FARWELL J. 1906 ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

power to carry by tramway "animals, goods, minerals, and parcels"; it is plain that these things could not be loaded on, or unloaded and delivered from, the tramcars in the public street. The defendants were bound to have some sort of station or depot to do such work in. As to delivery of parcels, the defendants are in the same position as a railway company. Every railway company in this country conveys goods to and from its stations, but they have no statutory powers to do it; they have always been allowed to do it as auxiliary or subsidiary to their business as carriers by rail: *Hall & Co.* v. *London, Brighton and South Coast Ry. Co.* (1); *Sowerby* v. *Great Northern Ry. Co.* (2); *Baxendale* v. *London and South Western Ry. Co.* (3) None of the Acts discussed in those cases contained any power to do these things. The power to do them is assumed as auxiliary to the business of the railway company: so in this case, the doing of these things is incidental to the business of carrying parcels by tramways which the defendants are authorized to carry on.

In *Attorney-General* v. *London County Council* (4) all the judges laid stress on the business of running omnibuses being a new and separate business not in any sense ancillary to the tramways. It is not requisite that what is done should be necessarily implied as incidental to that for which express power is given; it is enough that it should be reasonably implied: see judgment of James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (5), which was approved by Lord Selborne in the same case in the House of Lords; and see *Attorney-General* v. *North Eastern Ry. Co.* (6)

If any part of what the corporation have done is beyond their statutory powers, the things so done have caused no expense to the city fund or the rates. The corporation only used for these purposes the vans, horses, servants, and plant which they were compelled to provide for their legitimate tramway business. The doing of these things increased the profits, but did not increase

(1) (1885) 15 Q. B. D. 505.
(2) (1891) 7 Ry. & Ca. Tr. Cas. 156.
(3) (1866) L. R. 1 Ex. 137.
(4) [1901] 1 Ch. 781.
(5) (1879) 11 Ch. D. 449-80; (1880) 5 App. Cas. 473-8.
(6) Ante, p. 310.

the costs. The tramways as a whole brought in large profits. The corporation, being created by charter, had power at common law to carry on this business so long as they did not charge the city fund with the costs.

Upjohn, K.C., in reply. The only question is, Can the corporation carry on the business of a common carrier and pay the necessary expenses out of the rates?

In *Sowerby* v. *Great Northern Ry. Co.* (1), a distinction is drawn between the railway company's acting as special carriers on their line, for which they would charge the statutory toll and no more, and acting as common carriers beyond the end of their line, for which they were allowed to make an extra charge.

In this case the corporation have no power to act as common carriers. Every word in any of their Acts is satisfied by a power to act as special carriers on the tramways.

It is plain that the wrongful acts in excess of the limited powers of the corporation will cause some expense to the city funds; therefore the plaintiffs are entitled to an injunction: *Attorney-General* v. *Aspinall* (2); *Attorney-General* v. *Wilson* (3); *Attorney-General* v. *Newcastle-upon-Tyne Corporation.* (4) The insurance of parcels and the acting of agents for the railway companies must cause a risk of loss, and so involve charges on the city fund, and should also be restrained.

Cur. adv. vult.

Feb. 5. FARWELL J. This is an action by the Attorney-General on the relation of a ratepayer against the corporation of Manchester claiming, in effect, an injunction to restrain the defendants from acting as carriers or delivery agents, excepting on their tramways, and from expending any of the corporate moneys for that purpose, and for incidental declarations. The defendants were incorporated by Royal Charter dated October 23, 1839, and they justify the acts complained of both under the powers given to them by their private statutes and also under their common law rights and powers as a corporation by charter, and they claim the right to act generally as common carriers.

(1) 7 Ry. & Ca. Tr. Cas. 156.
(2) (1837) 2 My. & Cr. 613.
(3) (1840) Cr. & Ph. 1.
(4) 23 Q. B. D. 492.

FARWELL J.
1906
ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

The action is to a great extent quia timet, for the defendants commenced operations last year, and the writ was issued on May 5, 1905. The defendants have called no evidence to shew what business is actually done by them, and their acts and intentions are gathered from the documents put in evidence and their admissions and answers to interrogatories. Their intention is to put in operation a large and comprehensive scheme of parcels delivery and collection, and, as part of this scheme, they propose to accept "cash on delivery" parcels, i.e., parcels of which the value is to be collected by them on delivery, and subsequently handed to the senders; "express delivery," i.e., parcels to be delivered by special messengers at special rates; and to insure parcels. They also propose to act as agents for all railway companies for the receipt of parcels, and to pay to the companies monthly all moneys due to them for the carriage of parcels in consideration of a payment to the corporation of a penny per parcel for collection. They propose also to collect and deliver parcels outside the radius of their tramway lines altogether between places having no connection with their tramways; and to collect and deliver goods which have never travelled, and are not intended to travel, by their tramcars at all. In April, 1905, they issued a book of rates and arrangements for the conveyance of parcels traffic from Manchester to all parts of the United Kingdom and abroad, and described themselves as agents for all railway companies, and they have spent several thousand pounds in plant, vans, and horses, and have engaged numerous agents and servants with a view to carrying on this business. All that expenditure has been or is intended to be entered in account and dealt with as part of the expenditure of the corporation in respect of their tramway undertaking, as part of the working and establishment expenses and cost of maintenance of the tramways. All the expenditure at present incurred in providing horses, vans, carts, stables, offices, and agencies used and to be used in connection with the collection, carriage, and delivery of parcels has been defrayed out of money borrowed by the tramway undertaking or capital applicable thereto. The charges for the services so proposed to be rendered will in many cases be

in excess of the maximum charges authorized for the use of the tramways when the tramways are used, and in cases when the tramways are not used will be made without statutory authority. Now the difference between a statutory corporation and a corporation incorporated by Royal Charter is well settled; the former can do such acts only as are authorized directly or indirectly by the statute creating it; the latter (speaking generally) can do everything that an ordinary individual can do. If, however, the corporation by charter be (as are the defendants) a municipal corporation, then they are subject to the restrictions imposed by the Municipal Corporations Act, 1882, and will be restrained from applying their borough funds to purposes not authorized by that Act: *Attorney-General* v. *Newcastle-upon-Tyne Corporation*. (1) If the defendants in this case had no statutory powers, it is plain that they could not apply their borough fund either for the purposes of the tramways or of the business of general delivery agents or common carriers. Granting that theoretically a corporation by charter could lawfully run tramways or carry on such a business, they could not do so in practice without the expenditure of money. It is accordingly argued in the present case that, if and so far as the defendants are carrying on business as carriers in excess of their statutory powers, they are doing so under their common law powers, and that the expense of such excess adds nothing to the expenses incurred in respect of the exercise of the statutory powers, and, therefore, cannot be restrained.

I will first consider the statutory powers of the defendants. Under the Tramways Act, 1870 (33 & 34 Vict. c. 78), a local authority was authorized to acquire possession of a tramway, but, if they did so, could only lease it to a third person or allow it to be used by the public on payment of tolls; nothing in the Act authorized any local authority to place or run carriages upon such tramway and to demand and to take tolls and charges in respect of the use of such carriages (s. 19). By a provisional order confirmed by an Act of 1875 (38 & 39 Vict. c. clxvii.), the defendants obtained powers (s. 6) to construct and maintain the tramway therein described with all

(1) 23 Q. B. D. 492.

FARWELL J.
1906
ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

proper rails, plates, offices, weighbridges, stables, carriage houses, warehouses, works, and conveniences connected therewith or for the purposes thereof and to work and use the same. Sect. 14 provides: "The tramways may be used for the purpose of conveying passengers, animals, goods, minerals, and parcels." Sect. 16 provides, under the head of tolls: "The promoters may demand and take for every passenger travelling upon any of the tramways, or any part thereof, any tolls or charges not exceeding 1*d.* per mile (and for this purpose the fraction of a mile beyond an integral number of miles shall be deemed a mile), but the promoters may charge for any less distance than three miles any sum not exceeding 3*d.*" Sect. 17: "The promoters may demand and take for all animals, goods, minerals, and parcels conveyed upon the tramways any tolls not exceeding the rates per mile specified in the schedule to this order annexed." Sect. 18: "If the promoters, under the authority of the Tramways Act, 1870, demise the rights of user of the tramways, and of demanding and taking in respect of the same the tolls and charges authorized by this order, such tolls and charges shall include all charges which may be made for the use of the tramways and of carriages, and for motive power, and every other incidental expense"; and then a list of tolls is appended. It will be observed that if the corporation demise the right to use the tramways, reference is made to incidental expenses which is not to be found in s. 16; and in a provisional order of 1878 (41 & 42 Vict. c. clxiii.), ss. 14 to 18, the tramways being then in lease, a similar provision is inserted, and in clause 16 certain tolls and charges are authorized, and it is enacted that "such tolls or charges shall include all tolls and charges which may be taken or made for the use of the tramways, and of carriages, wagons, or trucks, and for motive power, and every other expense incidental to such conveyance." Whatever may have been the reason for this distinction between the corporation and its lessees, the Manchester Corporation Act, 1897 (60 & 61 Vict. c. ccxli.), s. 20, clearly contemplates the working of the tramways by the corporation itself. It is common knowledge that by this time municipalities had in many cases been authorized to acquire works of a public nature within their boundaries with

a view to working them at a profit. It is no part of the function of this Court to consider whether municipal trading of this or any other kind is or is not politic; my duty is confined to construing the Acts by which the Legislature has conferred the power, and I know of nothing that would authorize me to apply principles of construction to an Act giving power to a municipality to carry on some trading operations differing from those applicable to an Act giving similar powers to any other corporate body. The next Act, 1899 (62 & 63 Vict. c. ccliv.), is that on which the defendants mainly rely. It recites "and whereas it would be of public and local advantage if the tramways within the city were worked in connection with those in the adjoining or neighbouring districts, and it is therefore expedient that the corporation should be empowered to take leases of and to work such last-mentioned tramways, and that further facilities as by this Act provided should be afforded for the working of tramways within and beyond the city"; and then it defines in s. 2: "'City tramway' means any tramway for the time being within the city; 'outside tramway' means any tramway for the time being in any district adjoining or near to or connected by tramway with the city; 'tramway undertaking' includes any tramway for the time being in lease to the corporation and all rights and powers of the corporation over or in respect of outside tramways." Sect. 8 provides, "Notwithstanding anything to the contrary contained in the Tramways Act, 1870, or in any other Act or Order, the corporation may place and run carriages on and may work any tramways for the time being belonging or in lease to the corporation or on which they may have any powers to place or run carriages, and whether within or beyond the city, and may take and demand tolls and charges in respect of such tramways and of the use of carriages thereon, and the corporation may reconstruct or alter such tramways and may provide all such buildings, cars, rolling-stock, engines, machinery, electric and other plant, apparatus and appliances, horses, and stables as they may deem requisite or convenient for the working or user by the corporation of such tramways by animal or mechanical power, and may sell or dispose of or exchange such of the before-mentioned articles and

FARWELL J.
1906
ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

things as from time to time may no longer be required"; and s. 22 provides: "Notwithstanding anything contained in any other Act or Order relating to any tramways for the time being belonging or in lease to the corporation or on which they have power to place or run carriages, such tramways may be used for the purpose of conveying and delivering animals, goods, minerals, or parcels: Provided always that the corporation shall not be under any obligation to carry on the tramways unless they think fit any animals, goods, minerals, or parcels except that every passenger travelling" may take 28 lb. weight with him; and s. 24 provides that, "subject to the provisions of this Act, s. 18 and the schedule of the Manchester Corporation Tramways Order, 1878, shall apply to and in respect of the city tramways and outside tramways for the time being belonging or in lease to the corporation or on which the corporation have power to place or run carriages"; and the provisions of s. 18 as to tolls and charges for goods and parcels, and so on, are similar to those in the Manchester Corporation Tramways Order, 1875, above mentioned. This Act in my opinion enables the corporation to run carriages and take tolls on all the network of tramways mentioned therein, and to use such tramways for the purpose of carrying passengers and of conveying and delivering animals, goods, minerals, and parcels. Mr. Upjohn pressed upon me that there is no power to carry or deliver, but merely a power to use the tramway for the purpose of carrying and delivering, but this appears to me too narrow a ground on which to found a decision. I refer to the Railways Clauses Consolidation Act, 1845, s. 86, and I find that there is no power to carry generally thereby conferred, but a power to "carry and convey upon the railway all such passengers, goods," &c. I am unable to see any real distinction between this and the power given to the corporation by ss. 8 and 22 of the Act of 1899. But a railway company acting (as all railway companies now elect to act and as the defendants act) as carriers, and not as either toll takers or conveyers (see Wills J.'s judgment in *Hall & Co.* v. *London, Brighton and South Coast Ry. Co.*) (1), have undertaken the ordinary duties of a carrier, and as Byles J. puts

(1) 15 Q. B. D. 505, 537.

it in *Taylor* v. *Great Northern Ry. Co.* (1): "The first duty of a common carrier is to carry the goods safely, and the second to deliver them." This duty to deliver would exist without the express use of the word in s. 22, and I cannot read that section as restricting the corporation to delivery from the trams. In the absence of custom or of special contract, I apprehend that a railway company is not bound to deliver at the house or shop of the consignee, but, if they do not, they are bound to keep the goods safely for a reasonable time and to deliver to the consignee or his agent when he calls for them. But there is nothing ultra vires in their delivering by cart or otherwise at the consignee's house or at any other place authorized by him, including the station of a railway company, such goods as they have brought on their lines; such delivery is fairly incidental to their authorized business. As Lord Halsbury L.C. puts it in *Sowerby* v. *Great Northern Ry. Co.* (2), "They" (that is, the Great Northern Railway) "are permitted by law to carry on the business not only along their line, but also in connection with it, and as part of the same general undertaking by which they make profit—the business of distributing the goods which they so bring from distant points to the places where the different consignees intend they shall be delivered. For that purpose they have to build stations, both for the receipt and for the despatch of goods which are so entrusted to them." It would be difficult in the present case to put any practical limit to the place of delivery. It cannot be at the terminus only—this is probably in the middle of the highway—some radius of space within which a receiving store may be situate must be allowed, and some means of conveying to this store must be permitted. There is no ground for confining it to manual labour—indeed, the weights mentioned in the schedule of tolls negative this; it must, therefore, be open to the defendants to use horses and carts even to get the goods to their own depot, and if they can do this, I see no reason why they should not be allowed to convey them to the consignee's address or some other place named by him. So far, therefore, as the expenditure complained of arises out of the working of their tramway undertaking,

(1) (1866) L. R. 1 C. P. 385, 387 (2) 7 Ry. & Ca. Tr. Cas. 170.

FARWELL J.
1906
ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

as explained above, I can see no objection to it. The defendants are empowered to build goods stations for the reception and for the delivery of goods; to provide and pay for carts and horses and the like for collection and distribution, and to pay wages to men employed for those purposes; to provide buildings to house the horses and carts so used; to receive and transmit goods by rail, and to insure; for inasmuch as a common carrier is an insurer of the goods entrusted to him at common law, it must be open to the defendants to make a bargain limiting such liability or undertaking it on special terms. So far as regards "cash on delivery goods," I have no evidence that this is part of the business of a common carrier, and I can only say that if it is then the corporation can accept goods for carriage and delivery on their trams on those terms.

But this is all restricted to goods which travel along the tramways, or some part thereof; there is nothing in the Acts to authorize the corporation to act as carriers generally without reference to their tramways. The question, as is pointed out in *Attorney-General* v. *London County Council* (1), is not whether the business can be conveniently or advantageously conducted with the tramway business, but whether it is by necessary implication incidental or accessory to it, and I think that it is not. To collect and deliver parcels for the tramway is fairly incidental; to collect and deliver parcels outside the radius of the tramway, and without any connection with the tramway, is not incidental to the tramway business, but distinct from it. At the best it could only be said to be incidental to the incidental, and such reasoning would authorize a railway company to carry on a coal merchant's business, because they must buy coal; but this was restrained in *Attorney-General* v. *Great Northern Ry. Co.* (2) For the same reasons I hold that the corporation cannot act as general agents for the railway companies, but only in respect of tram-borne goods.

The defendants, however, further contend, and I think rightly, that the corporation can so act by virtue of its corporate existence, and that this Court will only interfere to prevent the expenditure of the borough funds on such a venture;

(1) [1901] 1 Ch. 781. (2) (1860) 29 L. J. (Ch.) 794.

but they say also that there is nothing to shew that they have made any such expenditure. I have, however, already stated that they threaten and intend to do so, and I am not satisfied that they have not already done so. It is obvious that a delivery service by carts to and from villages not connected with the company's line, and a general agency for all railway companies, must entail expense, even if the same carts and men be used as are employed ordinarily in tram service proper; more of both are required, and there is wear and tear to be considered; the horse that delivered tram-borne parcels only might last for years, while the journeys between outside villages might break him down in a twelvemonth. I cannot believe that a large general delivery service and a general railway agency can be added without expense to a service limited to the connection with the tramways. No evidence has been given of the amount of such expenditure, but the plaintiff is, in my opinion, entitled to an account at his own risk of all sums so expended.

I have said nothing so far as to the charges which the corporation make for the services rendered by them in addition to the sums allowed by their Acts, and I do not think it is proper that I should in this action express any opinion as to their legality. The Attorney-General sues on the relation of a ratepayer to restrain the improper use of the borough fund; these charges when received are an increase to the borough fund; if anyone can complain, it is the person against whom they are made; the relator profits by them. If they are wrongfully made, and litigation ensues, it is not a matter of course that the costs, if the corporation fail, would be allowed out of the borough fund; but, however that may be, the question of their legality appears to me to be one of some difficulty, and I am not aware of any authority which would justify me in preventing the corporation from receiving payments simply because it may be doubtful whether they are properly recoverable or not. An individual can make such charges and receive them; if they are wrongfully made, he may be liable to an action. The corporation as a chartered corporation may do the same; there is no depletion of corporate funds by such receipt; whether or not there will be when the payments

FARWELL J.
1906
ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

are successfully reclaimed I will leave to be dealt with when the question arises.

I propose to make a declaration that the defendants are not entitled to expend any part of the city fund, or the receipts of their tramway undertaking, or the proceeds of any city rate, or any other moneys of the defendants, or of the city, for the purpose of establishing or maintaining or carrying on the business of carriers, except as part of and in connection with their tramway undertaking, and in respect of articles carried along all or part of the tramways for the time being belonging or in lease to the corporation, or on which they have power to place or run carriages, and to grant an injunction in similar terms. If the plaintiff desires it, I will also direct an inquiry on similar lines, reserving the costs of such inquiry. I have felt some difficulty as to the costs of the action. The plaintiff has failed in a part of his claim, but he has also succeeded to a substantial degree, and there are no issues of fact by which the costs could be measured separately; the only evidence adduced by the defendants proved abortive. The action was properly brought, and the plaintiff ought, I think, to have the general costs, but with some considerable deduction. I have come to the conclusion that justice will be done if I order the defendants to pay to the plaintiff one half of his costs of the action, leaving the plaintiff to bear the other half, and the defendants will, of course, bear their own costs.

Solicitors: *Ince, Colt & Ince; Austin & Austin, agents for W. H. Talbot, Manchester.*

J. R. B.

PEAT *v.* CLAYTON.

JOYCE J.

1906

Feb. 13, 14, 20.

[1904 P. 2739.]

Company — Shares — Equitable Title — Right to Registration — Conflicting Equities—Priority—Negligence—Possession of Certificates—Distringas.

The owner of shares in a company executed an assignment of all his property to the plaintiffs as trustees for his creditors. The plaintiffs applied to the debtor for the certificates of the shares, but were unable to obtain them, whereupon they gave notice to the company of the assignment. The debtor afterwards through his brokers, C. & Co., sold the shares on the Stock Exchange, executed a transfer, and received the purchase-money. The company, notwithstanding the notice, entered the purchaser's name on the register as holder of the shares, but subsequently removed her name from the register and refused to issue certificates. At the request of the purchaser C. & Co. provided her with other shares in the company, and then claimed to be entitled to the shares sold on behalf of the debtor. In an action by the plaintiffs for a declaration that they were entitled to the shares:—

Held, that any lien which C. & Co. might have upon the shares was only upon the debtor's interest, which was subject to the right of the plaintiffs; and that the plaintiffs, not having been guilty of any negligence to deprive them of their equity, were entitled to be registered as owners of the shares.

On October 24, 1904, the defendant, C. D. Clayton, executed an assignment of all his property to the plaintiffs as trustees for the benefit of his creditors. Upon an examination of the debtor's affairs, it appeared from his books that at that date he was the registered holder of forty shares in the Randfontein Estates Gold Mining Company, Witwatersrand, Limited, and of seventy shares in the Oceana Minerals Company, Limited.

On November 7 the deed of assignment was registered by the plaintiffs under the Deeds of Arrangement Act, 1887. Shortly after the execution of the deed the plaintiffs requested Clayton to deliver to them his certificates for the said shares, and to execute transfers of the shares to them. This, however, he failed to do.

On November 8 the plaintiffs wrote to each of the companies, giving them notice of the execution of the deed of assignment

JOYCE J. 1906 PEAT v. CLAYTON.

and requesting them to make a note of the deed in their respective registers. In reply to the notice to the Randfontein Company the secretary wrote: "I am in receipt of your letter of yesterday, and note contents." The secretary of the Oceana Company wrote: "Replying to your letter of yesterday, C. D. Clayton is registered on our books as a holder of seventy shares, but we are unable to recognize any lien thereon as advised in your letter."

On November 10 Clayton instructed Cohen & Co., a firm of stockbrokers, to sell the two sets of shares, and in pursuance of his instructions, they sold forty shares in each company on the Stock Exchange in the ordinary way. On November 16 he handed the certificates of the shares to Cohen & Co., and, upon his signing transfers in blank, they advanced to him the sum of 25*l.* on account of the transaction.

On November 30 Cohen & Co. lodged the certificates with the completed transfers at the respective offices of the companies, and the transfers were duly noted to the effect that the certificates had been so lodged.

On December 1 Cohen & Co. handed the transfers to the brokers of the respective purchasers from whom they received the purchase-moneys, for which they duly accounted to Clayton.

From this point the dealings of the two companies with reference to the shares were slightly different. In the case of the Randfontein shares, the purchaser's broker took the transfer to the company for registration. The company refused to register, and the secretary communicated with the plaintiffs informing them of the transfer. The purchaser's broker thereupon demanded from Cohen & Co. other shares, which they purchased on the market and delivered in substitution for those originally sold.

In the case of the Oceana shares, it appeared that the transfer from Clayton, which was to a Mrs. Russell, was, in the first instance, entered upon the register of the company. This entry, however, was subsequently struck out, and the company refused to issue any certificate of the shares to Mrs. Russell. Her brokers then applied to Cohen & Co. for forty other shares, which they at once provided. In the case of both blocks of

shares Cohen & Co. applied to Clayton to put the matter right and to refund the purchase-moneys which he had received. This, however, he failed to do.

Cohen & Co. having alleged that they were entitled to be registered as owners of the shares in question, the plaintiffs brought this action against Clayton, the two companies, and Cohen & Co., claiming—(1.) a declaration that they were entitled to the shares as trustees of the indenture of October 24, 1904; (2.) an order upon Clayton to execute transfers of the shares to the plaintiffs; and (3.) injunctions to restrain the companies from registering transfers of the shares except to the plaintiffs.

On January 11, 1905, upon an undertaking by the Oceana Company not to register any transfer of the forty shares in their company, or part with the certificates of them except under the order of the Court, the action was dismissed as against that company.

The action now came on for hearing.

Younger, K.C., and *H. Johnston*, for the plaintiffs. On the registration of the deed of assignment the plaintiffs had a good equitable title to the shares. At that date Cohen & Co. had no title whatever. Before the sale by Clayton the plaintiffs completed their title so far as they could by giving notice to the companies of their claim to the shares. The purchasers from Clayton never had an absolute and unconditional right to registration. A fortiori the defendants Cohen & Co. never had any such right. Their right, if any, is against Clayton's interest in the shares, and that must be subject to the right of the plaintiffs: *Ireland* v. *Hart* (1); *Moore* v. *North Western Bank* (2); *Roots* v. *Williamson*. (3) The defendants Cohen & Co. may say that they are entitled to stand in the shoes of the purchasers, but they never asked for any transfer from the purchasers. No doubt for a short time Mrs. Russell was registered as holder of the Oceana shares, but she was never in complete possession, and never got any certificate. At the same time the company were affected with notice

(1) [1902] 1 Ch. 522. (2) [1891] 2 Ch. 599.
(3) (1888) 38 Ch. D. 485.

JOYCE J. 1906 PEAT v. CLAYTON.

of the plaintiffs' title, and under those circumstances Mrs. Russell never had an absolute and unconditional right to registration, and still less had the defendants, claiming through her, any such right. As to the Randfontein shares, the title of the purchasers has never been anything but equitable. They were never registered and never had "a present absolute and unconditional right" to registration. The equitable title of the plaintiffs is prior in date, and must prevail.

Hughes, K.C., and *E. Clayton* for the defendants, Cohen & Co.: Mrs. Russell had a good legal title to the Oceana shares. She was registered as a member of the company, and the issue of the certificate was not necessary to her title. The registration was subsequently struck out without proper authority. She was a purchaser for value without notice, and on registration acquired a legal title, which gave her priority over the plaintiffs' equitable title. Cohen & Co. are entitled to stand in her position. As brokers they, dealing according to the ordinary custom of the Stock Exchange and in fulfilment of their warranty, found shares to make good the contract, and they are entitled by subrogation to the rights of the purchaser. Her name was entered on the register, and she thus became legal owner of the shares. The subsequent unauthorized alteration of the register had no more effect than would the tearing-up of a conveyance. The Companies Act, 1862, s. 35, contains provisions whereby the register may be rectified, and it can only be effected in the prescribed way. The proper inference is that the entry on the register was made under the implied authority of the directors.

As regards the Randfontein shares, the title of both the plaintiffs and the defendants is equitable, and the equity of the plaintiffs is no doubt prior in time, but that is the last circumstance to which the Court will have regard unless the equities are otherwise equal, which they are not in this case. The equity of the brokers is higher than that of the plaintiffs, because they did not take the reasonable precaution which would have prevented the loss which the brokers have suffered, viz., that of serving the companies with notice in lieu of distringas under Order XLVI., r. 4: *National Provincial Bank of England* v.

Jackson (1); *In re Castell & Brown, Ld.* (2); *Farrand* v. *Yorkshire Banking Co.* (3); *Taylor* v. *Russell* (4); *Rice* v. *Rice.* (5)

[JOYCE J. referred to *Bishop* v. *Balkis Consolidated Co.* (6)]

The company could not be affected with notice by a mere unauthenticated letter. The plaintiffs ought to have taken the proper formal step by which the company would have been bound; or they might have obtained an injunction restraining the company from transferring. The fact that even if a distringas had been placed upon the shares the brokers might still have sustained the loss does not affect the argument.

A. C. Clauson, for the Randfontein Company.

Younger, K.C., in reply. With regard to the Oceana shares, Mrs. Russell was never properly registered as the owner of them, and in striking out her name from the register, and restoring that of Clayton, the company only did that which the Court would have ordered them to do: *Hartley's Case* (7); Buckley on the Companies Acts, 8th ed. p. 648. But even if Mrs. Russell was entitled to be registered the plaintiffs have no title under her. When she obtained other shares from Cohen & Co. Clayton's shares reverted to him. The only remedy of Cohen & Co. is against Clayton. If they have any lien on the shares, it is only upon Clayton's interest therein, which, of course, is subject to the right of the plaintiffs. Both sets of shares are standing in the name of Clayton, and Cohen & Co. cannot shew any title to have them registered in their names. The plaintiffs have not been guilty of any negligence sufficient to deprive them of their equity: *National Provincial Bank of England* v. *Jackson.* (1) In order to succeed Cohen & Co. must shew that they sustained the loss in consequence of the plaintiffs' negligence. No negligence is alleged in not obtaining the certificates. The plaintiffs asked for them, and gave notice of their claim to each of the companies, and in the case of one company it was properly treated. The mere failure to get the certificates from Clayton was not such negligence as to deprive the plaintiffs

(1) (1886) 33 Ch. D. 1.
(2) [1898] 1 Ch. 315.
(3) (1888) 40 Ch. D. 182.
(4) [1892] A. C. 244.
(5) (1853) 2 Drew. 73.
(6) (1890) 25 Q. B. D. 512, 520.
(7) (1875) L. R. 10 Ch. 157.

JOYCE J. 1906 PEAT v. CLAYTON.

of their equity: *Moore* v. *North Western Bank*. (1) It is said they ought to have placed a distringas on the shares. With reference to the Randfontein shares, the only effect of the distringas would have been to cause the company to refuse to register, which they did in consequence of receiving the notice of the plaintiffs' claim. As to the Oceana shares, it is said that if there had been a distringas the transfer would not have been certificated; but that is not so, for the practice is to give certification without reference to any distringas or stop. Cohen & Co. sustained their loss through their misplaced confidence in Clayton; it was not occasioned by any negligence on the part of the plaintiffs. In all the cases cited against us there was gross negligence. The plaintiffs have the prior equitable title, and are entitled to have the shares registered in their names.

Cur. adv. vult.

Feb. 20. JOYCE J., after stating the facts. As I understand the law, where there are several claimants to shares registered in the name of a third person, the equitable title which is prior in time prevails, unless the claimant under a subsequent equitable title proves that, as between him and the company, he had acquired an absolute and unconditional right to be registered as the owner of the shares before the company received notice of the other claim. In my opinion, therefore, the plaintiffs appear to be entitled to these forty shares in the Randfontein Company. But Messrs. Cohen claim a lien upon them. If they have any lien, however, it is only equitable, and can only be upon Clayton's interest, which is subject to the right of the plaintiffs under the deed of assignment. Then it was said that the plaintiffs had disentitled themselves by negligence. I see no negligence on the part of the plaintiffs, unless it be, as Messrs. Cohen allege, in not adopting the procedure now substituted by Order XLVI., r. 4, for the old procedure by distringas. I cannot accede to the contention that by reason of the omission to adopt this course the plaintiffs must be postponed. If they had proceeded by distringas the result would have been just the same. It would only have

(1) [1891] 2 Ch. 599.

prevented the company from registering the transfer to the purchaser, which in fact they did refuse to do by reason of the notice given to them on November 8 on behalf of the plaintiffs. It was suggested, but not seriously contended, and at all events there is no evidence to shew that a distringas would have prevented what was called the certification, or the noting on the back of the transfer that the certificates had been lodged. As I understand this note, it only amounts to a representation that a document has been lodged with the company, apparently in order, and shewing prima facie that the transferor is entitled to the shares, but it is no warranty of the transferor's title to the shares, or as to the validity of any of the documents, or that the company has received no notice in lieu of distringas or any other notice affecting the matter. Messrs. Cohen never inquired of the company whether there was any distringas or other stop against the registration of that transfer of the shares. So much for the Randfontein shares.

As to the Oceana shares, the case is practically the same, the only difference being that on referring to the register of members of that company (and there is no other evidence upon the subject) it seems that the transfer from Clayton of the forty shares, which was in fact to a Mrs. Russell, was in the first instance entered upon the register, though under what circumstances or whether by any express authority of the board does not appear. At all events, in my opinion no such registration ought to have been made, having regard to the notice the company had received on November 8, without previous communication with the giver of that notice. Mrs. Russell, however, was not able to get from the company any certificate for the shares, and her brokers applied to Messrs. Cohen and demanded other forty shares, which were at once provided. The transfer of those was registered, certificates were issued in due course, and the registration of the former transfer from Clayton to Mrs. Russell cancelled, or not proceeded with, no doubt with Messrs. Cohen's concurrence, so that in the result the shares are in the name of Clayton still. They are not in the name of Messrs. Cohen, who have no transfer from Mrs. Russell. It is contended that the true view is that Mrs.

JOYCE J. 1906 PEAT v. CLAYTON.

Russell still remains on the register as the owner of those forty shares sold to her brokers by Messrs. Cohen on Clayton's behalf and that Messrs. Cohen have a lien on those shares. Mrs. Russell does not claim the shares, and she was not made a party to the action. I do not think that she has any such legal interest as is contended. At all events, Messrs. Cohen's interest, if any, is equitable only. In my view they had no present absolute unconditional right to be registered as owners of those shares before the company had notice of the claim of the plaintiffs, or, indeed, at any time. As in the case of the Randfontein shares, so in the case of the Oceana shares, I am of opinion that Messrs. Cohen's lien, if any, is only upon Clayton's interest, which is subject to the prior equitable rights of the plaintiffs.

When Mrs. Russell applied for registration, the money received by Messrs. Cohen on the sale had gone to Clayton. A distringas would not have prevented its payment, although it would have prevented any registration of Mrs. Russell's transfer, and Messrs. Cohen would have been, if possible, in a worse position than they are now. In the case of the Oceana shares, as well as in the case of the Randfontein shares, a distringas would not have saved Messrs. Cohen from the loss they sustained by trusting Clayton and upon his instructions proceeding to sell without first ascertaining that there was no stop or impediment to the registration of the transfer of the shares. I must not be understood to say that it is usual to do that. What I have already said with reference to the certification and the absence of negligence on the part of the plaintiffs applies to the case of the Oceana shares just as much as to that of the Randfontein shares. The result is that the plaintiffs are entitled to a declaration in their favour, and to an order upon each of the companies to register them as the holders of the shares.

Solicitors : *Andrew, Wood, Purves & Sutton, for J. Hewitt, Barnsley; Cohen & Cohen; Linklater & Co.*

G. A. S.

In re RATTENBERRY. RAY *v.* GRANT.

[1905 R. 1436.]

SWINFEN EADY J.

1906

Jan. 16, 19, 30.

Will—Satisfaction—Debt due from Testator at Death—Legacy to Creditor of larger Amount—No Time fixed for Payment—Debt carrying Interest—Creditor appointed Executrix.

A testatrix gave to her sister R. a legacy of 400*l.*, and appointed her executrix. At the time of her death the testatrix was indebted to R. in the sum of 150*l.* which carried interest, and on which interest had been paid up to her death:—

Held, that neither the fact that the legacy was not payable until one year after the death, nor the appointment of R. as executrix, took the case out of the general rule, and the legacy was a satisfaction of the debt.

Mrs. Rattenberry, the testatrix in this action, by her will, dated November 23, 1903, made the following bequest: "I give and bequeath to my sister, Clara Alberta Ray, the sum of 400*l.*," and after giving some other legacies, directed the residue of her estate to be divided among all her nephews, and appointed C. A. Ray and Margaret Fraser Dallas executrixes. The will did not contain any direction to pay debts. The testatrix died on February 22, 1904, and her will was proved by C. A. Ray alone, Mrs. Dallas having renounced probate.

The testatrix was at her death indebted to her sister, C. A. Ray, in the sum of 150*l.* Of this the testatrix had borrowed 100*l.* on January 26, 1899, and signed the following receipt: "Received of Mrs. Ray (my sister) the sum of one hundred pounds on January 26, 1899. Interest to be paid 5*l.* per annum in half-yearly instalments of 2*l.* 10*s.*" On August 17, 1899, the testatrix borrowed from Mrs. Ray another sum of 50*l.*, and signed a receipt in a similar form.

On November 7, 1902, the testatrix signed a memorandum in the presence of two witnesses in the following form: "I owe my sister, Clara A. Ray, one hundred and fifty pounds, for which I am paying 5 per cent. interest." Interest was regularly

SWINFEN EADY J.
1906
RATTENBERRY, *In re.*
RAY *v.* GRANT.

paid up to the testatrix's death. Her estate was more than sufficient to pay her debts and the legacies given by her will and expenses. Mrs. C. A. Ray had retained the 150*l.* and interest out of the estate.

This summons was taken out by C. A. Ray for the determination of the question whether the debt of 150*l.* was satisfied by the legacy of 400*l.* The defendant was a nephew of the testatrix and one of the residuary legatees.

Baden Fuller, for the plaintiff. The rule that a debt shall be satisfied by a legacy of equal or greater amount is always founded on *Talbot* v. *Duke of Shrewsbury*. (1) There are other reports which all seem to be copies of that in Prec. Ch., but the record has been searched, and it appears that the will directed that legacies should be taken in discharge of debts, so the case was decided on the construction of the will, not on a presumption in equity, and the statement of the general rule is a mere dictum.

[SWINFEN EADY J. It has been acted on so often that it cannot be questioned now.]

There are three reported cases before *Talbot* v. *Duke of Shrewsbury* (1): *Atkinson* v. *Webb* (2), where an annuity given by the will was held not to be in satisfaction of an annuity of the same amount secured by bond, because the latter was stated to be free of taxes; *Brown* v. *Dawson* (3), where the amounts of the annuities were precisely the same; and *Cuthbert* v. *Peacock* (4), where the legacy was larger than the debt, but it was held there was no satisfaction, because there was some indication that the testator intended to benefit the particular legatee more than others.

In *Clark* v. *Sewell* (5) Lord Hardwicke L.C. said "a legacy that ought to be deemed a satisfaction must take place immediately after the death." All the cases shew that very slight circumstances will take the case out of the rule. In this case there are two such circumstances: (1.) The debt is payable at once and

(1) (1714) Prec. Ch. 394.
(2) (1704) 2 Vern. 478; Prec. Ch. 236.
(3) (1705) 2 Vern. 498; Prec. Ch. 240.
(4) (1707) 2 Vern. 593; 1 Salk. 155.
(5) (1744) 3 Atk. 96, 97.

carries interest, the legacy need not be paid for a year and carries no interest; (2.) the legatee is appointed executrix, she had a right to retain her own debt when she paid others, and until all were paid no question of paying the legacy could arise. The whole rule is founded upon the presumed intention of the testator. Where the amounts are exactly equal, as in *Atkinson* v. *Littlewood* (1) and *In re Fletcher* (2), that will be taken as evidence of the intention, but where they are not, there must be some indication of the intention.

In *In re Dowse* (3) Hall V.-C. considered that the fact that an annuity given by a will, without any direction as to time of payment, would not be payable until the end of the year prevented its being a satisfaction of an annuity payable half-yearly, and that case was followed by Stirling J. in *In re Horlock.* (4) *Fowler* v. *Fowler* (5) is the strongest case against me, and the circumstances there were wholly different. *Haynes* v. *Mico* (6) and *Crompton* v. *Sale* (7) are decisions in favour of the plaintiff.

Austen-Cartmell, for the defendant. The argument for the plaintiff would really abolish the rule, for the payment of legacies can never be enforced for a year after the death, and debts are always payable at once. The different times of payment cannot take the case out of the rule unless a different time of payment is expressly indicated in the will: Theobald on Wills, 6th ed. p. 734; 2 White & Tudor's Leading Cases, 7th ed. p. 394. *In re Horlock* (4) was decided on that ground. *In re Dowse* (3) is the only case where satisfaction was not allowed, in which the will did not specify an express time for payment of the legacy, and there the gift was an annuity which would naturally be payable half-yearly at the end of half a year and a year from the death, so that it involved fixed times of payment different from those at which the debt was payable. The rule is clearly laid down in other old cases as well as in *Talbot* v. *Duke of Shrewsbury* (8): see *Clavering* v. *Clavering* (9); *Atkinson* v. *Webb* (10);

(1) (1874) L. R. 18 Eq. 595.
(2) (1888) 38 Ch. D. 373.
(3) (1881) 50 L. J. (Ch.) 285.
(4) [1895] 1 Ch. 516.
(5) (1735) 3 P. Wms. 353.
(6) (1781) 1 Bro. C. C. 129.
(7) (1729) 2 P. Wms. 553.
(8) Prec. Ch. 394.
(9) (1704) 2 Vern. 473; Prec. Ch. 235.
(10) 2 Vern. 478; Prec. Ch. 236.

SWINFEN EADY J.
1906
RATTENBERRY, *In re.*
RAY *v.* GRANT.

Chancey's Case. (1) No doubt slight expressions of intention will take a case out of the rule, but here there are none whatever. The case is really covered by *In re Fletcher.* (2)

[SWINFEN EADY J. That was a case of ademption.]

Yes, but it was decided on the ground that if the debt had not been paid off the legacy would have satisfied it. *Gaynon* v. *Wood* (3) and *Edmunds* v. *Low* (4) are cases in which a debt was held to be satisfied by a simple legacy to which the rule as to payment at the end of twelve months applied. [He also referred to *Crichton* v. *Crichton.* (5)]

Cur. adv. vult.

Jan. 30. SWINFEN EADY J. The rule is that a legacy to a creditor of an amount equal to or greater than the debt is prima facie to be considered a satisfaction of the debt.

This rule was established two centuries ago; but no sooner was it established than it was frequently disapproved of, and exceptions were engrafted upon it. In *In re Horlock* (6) Stirling J. said that he joined with the many judges who had disapproved the rule laid down, and that he equally disapproved of the exceptions which had been grafted on it, but that both were binding upon him; they are both equally binding upon me. The present case is in my opinion within the rule, unless there is sufficient indication of intention to exclude it.

The debt was 150*l.*, money borrowed by the testatrix in 1899 from her sister the plaintiff, upon which the testatrix paid interest at 5 per cent. during her life, and it was payable on demand.

The legacy is a general pecuniary legacy of 400*l.* without any time being specified for payment, and without any mention of interest. The will bears date November 23, 1903, and does not contain any direction to pay debts.

It is sought to exclude the rule on the ground that the debt carries interest from the death and the legacy only from one

(1) (1717) 1 P. Wms. 408; 2 Wh. & T. 7th ed. p. 376.
(2) 38 Ch. D. 373.
(3) (1759) 1 Dick. 331.
(4) (1857) 3 K. & J. 318.
(5) [1895] 2 Ch. 853; [1896] 1 Ch. 870.
(6) [1895] 1 Ch. 516, 522.

year after the death. But it was decided by Lord Hardwicke in *Clark* v. *Sewell* (1) that where the legacy is in satisfaction of a debt and no time is fixed for payment of the legacy it carries interest from the death of the testator. If the will mentions a date for payment, then interest will only run from that date; and this was the ground upon which *Haynes* v. *Mico* (2) and *Adams* v. *Lavender* (3) were decided, as pointed out by Stirling J. Indeed, in *Clark* v. *Sewell* (1) Lord Hardwicke said: "According to the rule of this Court, a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator: for the debt, whether of a principal sum or for interest, is due at the death of the testator, and therefore the legacy must be so too. . . . . There is no case to make a legacy a satisfaction of a debt, where the legacy is not due at the time of the testator's death, but is made contingent, and to take place at a future day, ... whether the postponing the legacy is a month only or a longer time, it makes no manner of difference." Lord Hardwicke, in referring to a legacy that "must take place immediately after the death of the testator," means a legacy the payment of which is not postponed by the testator. A legacy is within the rule laid down by Lord Hardwicke if it is an immediate legacy, although, of course, only payable in a due course of administration and after debts and funeral expenses have been provided for.

In *Fowler* v. *Fowler* (4), where the debt due at the date of the will was 200*l.*, for arrears of pin money, and a general pecuniary legacy of 500*l.* was given, Talbot L.C. held that the legacy was a satisfaction of the debt. In *Gaynon* v. *Wood* (5) there was a bond debt of 200*l.* and a legacy of 500*l.* given to the creditor by a subsequent codicil, and the Master of the Rolls held that the legacy must be taken in satisfaction of the debt, and the fact that since the death the executors had paid the bond debt to the creditor made no difference in adjusting the rights of the parties.

So, again, *In re Fletcher* (6), before North J., is an instance

(1) 3 Atk. 96, 98.
(2) 1 Bro. C. C. 129.
(3) (1824) 1 M'Cl. & Y. 41.
(4) 3 P. Wms. 353.
(5) 1 Dick. 331.
(6) 38 Ch. D. 373, 376.

SWINFEN EADY, J.
1906
RATTENBERRY, *In re.*
RAY *v.* GRANT.

of a legacy being given in satisfaction of a debt, where the debt carried interest, and where no time was fixed for payment of the legacy. In that case the debt was in fact paid off by the testator in his lifetime, and the actual decision was that the legacy had been adeemed, but the learned judge first considered how the matter would have stood if the debt had not been so paid off. He said: "Suppose the debt had not been paid, could the widow have taken the debt as well as the legacy? I think clearly not." The fact, therefore, that the legacy is given generally, without any reference to time of payment or interest, will not exclude the rule.

Reliance was also placed on the fact that the plaintiff was appointed executrix and could retain her own debt, but in my opinion this makes no difference. As I have already pointed out, in the case of *Gaynon* v. *Wood* (1) the debt had been actually paid by the executor. I am therefore bound by the authorities to which I have referred to hold that in the present case the legacy is a satisfaction of the debt.

The distinctions between the cases on the satisfaction of debts by annuities are very slender, as may be seen by comparing *Atkinson* v. *Littlewood* (2), before Malins V.-C., and *In re Dowse* (3), before Hall V.-C., which latter case was followed by Stirling J. in *In re Horlock* (4); but it is by the decisions on cases of legacies, which leave no room for doubt, that the present case is governed.

Solicitors: *Gribble, Oddie, Sinclair & Johnson, agents for Whiteford & Bennett, Plymouth; Langford & Fisher.*

(1) 1 Dick. 331.
(2) L. R. 18 Eq. 595.
(3) 50 L. J. (Ch.) 285.
(4) [1895] 1 Ch. 516.

J. R. B.

In re HOLE.
DAVIES *v.* WITTS.

[1899 H. 2411.]

C. A.
1906
March 2, 5, 6, 7, 20.

Estate Duty—Real and Personal Estate—Incidence of Duty—Lunatic entitled to both Real and Personal Estate—Payment of Duty on Realty out of Personalty—Surplus Rents—Charge in favour of Next-of-Kin—Heir-at-Law—Merger of Charge—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-s.* 2; *s.* 9, *sub-s.* 1.

H. by her will appointed D. her executor and trustee, but, in the events which happened, died in 1896 intestate as to her real and personal estate, leaving her brother, a lunatic, her sole next-of-kin and heir-at-law. D. was also committee of the lunatic. D. paid the estate duty in respect of both the real and personal estate out of the personal estate. The lunatic died intestate in 1903; his income was more than sufficient for his maintenance, the surplus rents of his real estate were accumulated during his life, and the accumulations were more than sufficient to have paid the amount of the estate duty attributable to the real estate. The lunatic's next-of-kin claimed to be entitled to a charge on his real estate for the amount of duty paid in respect thereof out of his personal estate:—

Held (affirming the decision of Farwell J., [1905] 2 Ch. 384), that, assuming the payment of the estate duty created a charge upon the real in favour of the personal estate, any charge which might have existed at the time of the payment of the duty on the realty out of the personalty in favour of the personalty was extinguished before the death of the lunatic; that as there was no interest in the lunatic requiring the charge to be kept alive, and, under the circumstances, no person who could require the charge to be raised, it had merged.

Held, also, that the case was covered by *Lord Compton* v. *Oxenden* (1793) 2 Ves. Jun. 261.

Appeal from a decision of Farwell J. (1)

Algernon J. B. Davis, a lunatic, died intestate in February, 1903, possessed of considerable real and personal estate, and the question argued on this appeal was raised by a claim by his next-of-kin, as against his heir-at-law, to a charge on the lunatic's real estate in respect of the estate duty under the Finance Act, 1894, which had been paid in the first instance out of the

(1) [1905] 2 Ch. 384.

C. A. 1906 — HOLE, *In re.* DAVIES *v.* WITTS.

personal estate, when the lunatic succeeded to both properties in December, 1896. The material facts were shortly as follows :—

Horatio Davis, the father of the lunatic, who died in 1857, bequeathed an annuity of 400*l.* for the benefit of his son, Algernon J. B. Davis, during his life, or until he should become of sound mind, to be secured on such part of the testator's real and personal estate as the trustee should think best for his said son, and subject thereto, in the events which happened, he devised his real estate to his daughter, Mrs. Frances Jane Hole, for life, with a general power of appointment by will.

In 1864 Algernon J. B. Davis was found a lunatic. There was no evidence to shew that the trustee of Horatio Davis's will had ever elected to charge the said annuity on the real estate to the exclusion of the personal estate.

Mrs. Frances Jane Hole died in December, 1896, having by her will appointed Canon S. E. Davies her sole executor and trustee, and devised and bequeathed to him all her real and personal estate upon trusts which, in the events which happened, the Court in the year 1900 declared to be void, with the result that she died intestate as to the real estate over which she had exercised her testamentary power, and as to her residuary personal estate, leaving the lunatic her heir-at-law and sole next-of-kin, who thus became absolutely entitled to the whole of her estate as from her death.

Canon Davies was also committee of the lunatic's estate ; he paid all the estate duty which became payable on Mrs. F. J. Hole's death, including 816*l.* 15*s.* 9*d.* payable in respect of her real estate out of her personal estate. No application was made in the lunacy jurisdiction with reference to this payment. All the debts and liabilities of the testatrix, Mrs. F. J. Hole, were paid and discharged in the lifetime of the lunatic.

The income of the lunatic's estate was more than sufficient for his maintenance, and the surplus rents and profits of his real estate, after providing for a proportion of his maintenance, were accumulated.

On February 20, 1903, the lunatic died intestate, and without having recovered his sanity.

The accumulations of surplus rents and profits of real estate

between the date of the death of Mrs. Frances Jane Hole and that of the lunatic were more than sufficient to have paid the 816*l.* 15*s.* 9*d.*

A petition was presented, entitled in three actions for the administration of the estates of Mrs. Frances Jane Hole and Horatio Davis, by some of the lunatic's next-of-kin, for a distribution of his real and personal estate, and asking (among other things) for a declaration that they were entitled to a charge upon the lunatic's real estate for the 816*l.* 15*s.* 9*d.* so paid out of personal estate for the estate duty payable in respect of real estate.

Farwell J. held, on the assumption that the estate duty created a charge upon the real in favour of the personal estate, that the charge ought to have been paid out of the accumulation of rents, and must be deemed to have been discharged, and that the claims of the petitioners failed.

The petitioners appealed.

Upjohn, K.C., and *R. J. Parker*, for the appellants. Canon Davies paid the estate duty in respect of the real estate under the power given to him by the Finance Act, 1894, s. 6, sub-s. 2; the real estate in respect of which this duty was paid was not "under his control" as executor, and he must, therefore, be taken to have paid the duty at the request of the "persons accountable;" that is, at the request of the lunatic, i.e. at the request which he impliedly made to himself in the character of committee of the lunatic—a thing that is apparently possible, as suggested by Chitty J. in *In re Meyrick* (1): but does "person accountable" mean all the persons accountable, or the person ultimately accountable, that is, the beneficiary? The effect of the payment, in any case, was to create a charge upon the real estate under s. 9, sub-s. 1, of the Finance Act; and up to the present the real estate of the lunatic has benefited to the extent of 816*l.* The payment was either a mere ministerial act, made for the convenience of administration, in which case it could not alter the rights of the parties, or if it was not made on the request of the "person accountable," was an unauthorized payment,

(1) [1897] 1 Ch. 99, 108.

C. A. 1906 — HOLE, *In re.* DAVIES *v.* WITTS.

which, again, could not alter the rights of the parties, i.e. as between the next-of-kin and heir-at-law; and this unauthorized payment can and ought now to be adjusted and set right.

But assume that the payment was an authorized one, then, if it was a payment with authority, it converts the property into realty at once under s. 9, sub-s. 1, which makes it a first charge. By s. 9, sub-s. 2, the Commissioners are to grant a certificate of the estate duty "paid," not payable, in respect of the property; and by s. 9, sub-s. 3, the certificate is to be conclusive evidence that the amount of duty named therein "is," not shall be, a first charge on the lands. This all pre-supposes that the duty has been paid; and the certificate is conclusive evidence of the charge, and is a transferable instrument. This particular charge was never at home in the hands of the lunatic, and it therefore is a subsisting charge; sub-s. 5 gives the executor power to raise the duty by mortgage. The proper construction, therefore, of s. 6 and s. 9 is that the executor who has power to pay the duty payable in respect of the real estate only pays it on the terms that a charge is created for the benefit of everyone concerned, but the rights of the parties are not affected. It is not a fiduciary power or trust to pay, but an administrative power; the charge is not to prejudice anyone's rights, but it can only come to an end by getting into the hands of someone who is entitled to both the real and the personal estate. In *Newcombe* v. *Newcombe* (1) the payment off of the charge had been sanctioned as a proper payment out of the estate, and for the benefit of the lunatic; except on this ground it is inconsistent with *Awdley* v. *Awdley* (2) and *Attorney-General* v. *Marquis of Ailesbury*. (3) *Awdley* v. *Awdley* (2) shews that the committee cannot alter the character of the lunatic's property without the leave of the Court, and the Court never alters the nature of the property when the owner is a lunatic. This charge, therefore, was alive at the death of the lunatic, it had not merged, and the benefit of the charge now belongs to the next-of-kin, and they have the right to enforce it. Farwell J. in his judgment treated Canon Davies as mortgagee

(1) (1841) 3 Ir. Eq. Rep. 414. (2) (1690) 2 Vern. 192.
(3) (1887) 12 App. Cas. 672, 690.

in possession for all purposes: as a fact he was in possession as trustee of Mrs. Hole's will; he was not in possession as mortgagee—it was wrong to treat him so.

S. Dickinson, for other next-of-kin, adopted and claimed the benefit of this argument.

Butcher, *K.C.*, and *W. Higgins*, for the heir-at-law. The personal estate was clear of all debts and liabilities at the death of the lunatic; and there was a considerable sum derived from accumulations of surplus rents. The payment by Canon Davies out of the personal estate was authorized, and no doubt a charge on the real estate arose in consequence of this payment; but assuming that this charge existed, when it was found that the lunatic was entitled to both the real and personal estate, then there was a merger, and at the death of the lunatic this charge had disappeared. The executor was entitled to pay this duty because the property was "under his control," for he could mortgage it by s. 9, sub-s. 5, to raise the amount so paid; it was also authorized as paid on the request of "the persons accountable," i.e., by the implied request of himself as the trustee of Horatio Davis: *In re Meyrick.* (1) The "person accountable" will include either trustees or beneficiaries, and therefore, if requested by the "person accountable," this was an authorized payment which Canon Davies as executor was justified in making; he was also justified in making it on the ground that the property was "under his control," for the whole estate was under his control, and he could have sold the whole subject to the condition of defeasance, which, in the events which happened, never arose.

[ROMER L.J. The appellants' main argument is based on the assumption that the payment was authorized; you had better confine yourself to this point.]

Assuming there was no merger, then the charge remained but a bare charge in the hands of the executor, a charge which the Court would not enforce against the heir-at-law in favour of the next-of-kin. The estate was clear of debts in 1900, and though this charge may have existed in favour of the executor it was not wanted for payment of debts, and was held by the

(1) [1897] 1 Ch. 99.

C. A. 1906 — HOLE, *In re.* DAVIES *v.* WITTS.

executor in trust for the lunatic, and therefore the charge became merged in that way. The general principle of merger is discussed in *Swinfen* v. *Swinfen* (1); it was not for the interest of the lunatic to keep this charge alive, and he did nothing to keep it a subsisting charge, and the presumption would arise on the death of the lunatic, who was entitled to both properties, that this charge was merged: *Lord Compton* v. *Oxenden* (2); *In re French-Brewster's Settlements.* (3) If a merger has taken place, then there is an end of the case. But suppose merger has not taken place, then the Court would not interfere to raise an inert charge in favour of the next-of-kin. [*Oxenden* v. *Lord Compton* (4) and *Ex parte Bromfield* (5) were also referred to.]

Canon Davies was in possession, he had a charge, and why should he not be treated as mortgagee in possession? and, if so, he was bound to apply the surplus rents in payment off of this charge. In *Newcombe* v. *Newcombe* (6) the committee paid off the charges out of the surplus rents, and it was held that the next-of-kin had no equity to have them kept alive; and in *Lord Leitrim* v. *Enery* (7) Lord St. Leonards said that surplus rents ought to be so applied.

R. J. Parker, in reply. The charge created under s. 9 of the Finance Act was subsequent to and subject to the annuity of 400*l.* given by the will of Horatio Davis to the lunatic, and if Canon Davies is to be treated on the footing of a mortgagee in possession, he must first of all be taken to have paid the 400*l.* in full as part of the allowance for the maintenance of the lunatic, in which case the surplus rents would not have amounted to nearly so much; perhaps not even enough to have paid off this charge. The payment of the estate duty by the executor does not affect anybody's rights. The circumstances are not such as to produce a merger of the charge. The administration was not complete, and several actions were pending. Nothing happened between the payment by the executor and the death of the lunatic to alter the equities in any way. This case is governed by *In*

(1) (1860) 29 Beav. 199.
(2) 2 Ves. Jun. 261.
(3) [1904] 1 Ch. 713.
(4) (1793) 2 Ves. Jun. 69.
(5) (1792) 1 Ves. Jun. 453, 462.
(6) 3 Ir. Eq. Rep. 414.
(7) (1844) 6 Ir. Eq. Rep. 357.

re Leeming (1), and is distinguishable from *Oxenden* v. *Lord Compton* (2), where the rights were united without any intervening right.

Butcher, K.C., in reply on *In re Leeming.* (1) In *In re Leeming* (1) there may have been circumstances rendering it right to keep alive the charge. In *Ex parte Phillips* (3) the decision was the other way.

Cur. adv. vult.

March 20. COLLINS M.R. I have had an opportunity of reading the judgments which have been prepared by my two learned brethren, and I entirely agree with them.

ROMER L.J. I think this appeal fails. It is clear that, unless immediately prior to the lunatic's death there was in existence some charge on his real estate for the benefit of the personal estate, the appellants' claim must fail; for, apart from the existence of such a charge, there is no equity in favour of the next-of-kin, as against the heir-at-law, to have the condition of the lunatic's estate at the date of his death altered for their benefit.

Now, the appellants say that when, on the death of Mrs. Hole, her executor paid the estate duty due in respect of the real estate, to which the lunatic became entitled on her death, out of her personal estate, a charge arose by virtue of the provisions of the Finance Act, 1894, upon that real estate to the extent of the duty so paid, in order to recoup those who might be injured by the duty having been paid out of the personal estate and not out of the real estate. I will assume that was so. But so far as concerns the lunatic himself, he was entitled both to the real and the personal estate, subject to the payment of Mrs. Hole's debts and the legacies given by her will. And before his death all the debts and legacies had been paid, and any small outstanding costs may be disregarded, seeing how ample the personal estate was. Under these circumstances, when I find (as was the fact) that an allowance was made for the lunatic's support out of the

(1) (1861) 3 D. F. & J. 43. (2) 2 Ves. Jun. 69.
(3) (1812) 19 Ves. 118.

C. A. 1906 — HOLE, *In re.* DAVIES *v.* WITTS. — Romer L.J.

income derived from the real and personal estate to which he was entitled, without distinguishing the income from the real estate and the income from the personal estate, it appears to me, under the circumstances, that that allowance should be treated as having been made rateably out of the two properties, according to their values, and that the ingenious suggestion of Mr. Parker, that a larger part of the allowance should be treated as payable out of the income of the real estate, cannot be supported. That suggestion was based on the terms of the will of the father of the lunatic, by virtue of which, in the events that happened, and after Mrs. Hole's death, the lunatic became entitled to the property existing at his death. By that will an annuity of 400*l.* a year was bequeathed in favour of the lunatic to be secured on such part of the father's real or personal estate as his trustee should think best for the son, and Mr. Parker suggested that the allowance for the lunatic's support should be treated as paid in respect of the annuity treated as charged on the real estate. But in fact the allowance was not made in respect of the annuity, nor (so far as I can ascertain) did the trustee even elect at any time to charge the annuity on the real estate to the exclusion of the personalty. Moreover, by the time of the lunatic's death, when the question arose as to how the allowance should be treated as distributed between the realty and personalty, there was no reason for preferring the one to the other, and, indeed, on Mrs. Hole's death the lunatic became entitled to the real estate without any necessity for treating the annuity as still existing, even if charged exclusively on that estate. Lastly, it is to be remembered that the estate duty after Mrs. Hole's death was paid on the real estate treated as freed from the annuity, and not on that estate subject to the annuity. Under these circumstances, and treating the allowance as made out of the real and personal estates rateably, I find that before the death of the lunatic there were surplus rents of the real estate which had gone to swell the personal estate to an extent more than sufficient to recoup to the personal estate any obligation due to it from the real estate in respect of the estate duty paid on the realty out of the personalty. It follows that any charge which may have existed at the time of payment of the duty on the realty in favour

of the personalty was extinguished before the death of the lunatic. And it appears to me that it would be very inequitable, as between the next-of-kin and the heir-at-law of the lunatic, to allow the former to claim the whole of the personal estate as increased by the surplus rents, and at the same time to insist that the real estate must be treated as being now indebted for their benefit to the personal estate. This disposes of the appeal. And I gather that Farwell J. decided the case on substantially the same ground, though he did not express himself quite in the same way that I have done, and one of his remarks as to the executor of Mrs. Hole being in the position of a mortgagee in possession may be open to criticism. Having regard to the view I have taken of the case, I need not consider any other grounds on which the appeal might have failed, though I am by no means to be understood as holding that such other grounds do not exist.

COZENS-HARDY L.J. Although the circumstances of this case are peculiar, I think the material facts may be shortly stated. The late Canon Davies filled three characters. He was sole trustee of the will of Horatio Davis, sole committee of Algernon Davis, a lunatic, and sole executor and trustee of the will of Mrs. Frances Hole. The first-named testator, Horatio Davis, gave an annuity charged upon his real estate for the benefit of his son, the lunatic, during his life, or until he should become of sound mind, and subject thereto, in the events which happened, he devised his real property to his daughter, Mrs. Hole, for life with a general power of appointment by will. He died in 1857. In 1864 the son, Algernon, was found a lunatic. The daughter, Mrs. Hole, died in December, 1896, having made a will and codicil, the ultimate beneficial dispositions of which have been declared by the Court to be void, with the result that she died intestate as to the real estate over which she had exercised her testamentary power, and as to her residuary personal estate, leaving the lunatic her heir-at-law and sole next-of-kin. All the debts and liabilities of Horatio Davis have many years ago been paid and satisfied. All the debts and liabilities of the testatrix, Mrs. Hole, were paid and discharged in the lifetime of the

C. A. 1906 — HOLE, *In re.* DAVIES *v.* WITTS. — Cozens-Hardy L.J.

lunatic, who died in February, 1903, and there is a large residue of her personal property far more than sufficient to provide for any costs. All the estate duty payable on Mrs. Hole's death, including 816*l.* 15*s.* 9*d.* payable in respect of real estate, was paid by Canon Davies out of her residuary personal estate. No application was made in the lunacy jurisdiction with reference to this payment. Canon Davies, as executor, paid the estate duty under the power conferred upon an executor by s. 6 sub-s. 2, of the Finance Act, 1894. I assume that this payment was authorized, and, further, that such a payment by an executor does not vary or affect the rights of different parties claiming the real and personal estate. The Finance Act is carefully framed so as to prevent any such injustice, an equitable charge being created on the real estate, and power being conferred upon the executor to create a legal charge for the estate duty properly leviable in respect of the real property. When, however, the same person is owner of the real property and absolutely entitled to the personal property, it is difficult to suppose that any charge can arise if the owner is of full age and of sound mind. But it is urged that where the owner is a lunatic it is the settled rule not to change personal property into real property, or vice versa. And on this footing the next-of-kin now claim to be entitled as against the heir-at-law to a charge on the real estate for the 816*l.* so paid. In my opinion this contention cannot prevail. There was no interest in the lunatic requiring the charge to be kept alive for his benefit. His income was more than sufficient for his maintenance, and in truth the surplus rents, of which the personal estate has had the benefit, seem to have more than sufficed to provide the 816*l.* The charge is not required by Mrs. Hole's representative for the purposes of her administration. And it is well settled that there is no equity between the real and personal representatives of a lunatic. Under these circumstances there is no person who can require the charge to be raised. It has merged in equity, for the lunatic, as next-of-kin under Mrs. Hole's intestacy, had a definite interest in the net residue, subject to payment of her debts and liabilities: see *Cooper* v. *Cooper*.(1) It may be that the term

(1) (1870) L. R. 6 Ch. 15.

"merger" is not strictly accurate to describe the result, but in substance a charge which no person in existence can require to be raised may well be said to have merged. Thus far I have dealt with the case on principle. It is, however, in my opinion governed by Lord Loughborough's decision in *Lord Compton* v. *Oxenden*. (1) In that case the lunatic was owner in fee simple of an estate subject to two charges of 1500*l.* in favour of his sister, one of which was secured by a trust term, and the other of which was only a charge in equity. The sister died in 1790 a spinster and intestate, neither sum having been raised in her lifetime. The lunatic was her sole next-of-kin. She left other personal property sufficient for payment of her debts, and her administrator took no step with regard to these sums. The lunatic died intestate in 1792. His next-of-kin filed a bill against his heir to have the two sums raised. It was there contended on behalf of the next-of-kin that the lunatic could not elect, that the money might have been required to be raised by the sister's representative, in whom the legal title was, and that the accident of this personal property coming to the lunatic in the nature of a charge on his own estate ought not to alter the condition of the property as between his real and personal representatives. Lord Loughborough said (2): "If any person entitled to the charge requires it to be raised for purposes fit and proper, it must be raised. Her personal representative cannot be entitled to raise it merely as administrator. She might have raised it, if she chose." And again: "It is a clear principle both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there can be no right put into execution (3): but there is an immediate merger." And again: "I take it, there is no objection to this proposition, that as between mere and absolute real and personal representatives there can exist no equity; but the interest must be taken, as fortune has directed it. Therefore the bill must be dismissed."

That seems to be a direct and clear authority in favour of the respondents on this appeal.

(1) 2 Ves. Jun. 261; 4 Bro. C. C. 397.
(2) 2 Ves. Jun. 262, 264, 265.
(3) "Exertion" in the original report, seemingly by a clerical error.

C. A. 1906 HOLE *In re.* DAVIES *v.* WITTS. Cozens-Hardy L.J.

Farwell J. arrived at the same result by a somewhat different road. He treated Canon Davies as mortgagee in possession, and held that in that character his mortgage was paid off by the receipt of rents and profits in excess of principal and interest. I am not prepared to assent to this view of his position. It is true that the personal estate has, apparently, in the events which have happened, been recouped out of the rents and profits, and probably this is all that the learned judge intended to assert. But I cannot regard Canon Davies as having either the duties or the responsibilities of a mortgagee in possession. I prefer to base my judgment on a ground which does not depend upon the total amount of rents and profits received, beyond what was required for the lunatic's maintenance. In my opinion the appeal fails, and must be dismissed with costs.

Solicitors: *Trower, Still, Freeling & Parkin; Currie, Williams & Williams; Richard Ballard.*

W. C. D.

C. A 1906 March 30.

In re JUDD AND POLAND AND SKELCHER'S CONTRACT.

[1905 J. 1165.]

Vendor and Purchaser—Conditions of Sale—Title—Trust for Sale—Leaseholds—Sale by way of Underlease—The Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 13.

Trustees for sale put up for auction five leasehold houses, held under one lease, in five separate lots, subject to a condition that if all the lots were sold at the present sale, the purchaser of the largest lot in value should execute an underlease for the whole of the term, less one day, to the respective purchasers of the other lots at an apportioned rent; but that if any of the lots remained unsold (which happened), "the vendors will grant to the purchaser or respective purchasers of the lot or lots sold such an underlease as aforesaid of each of the lots sold":—

Held (reversing the decision of Warrington J.), a valid exercise of the trust for sale.

In re Walker and Oakshott's Contract, [1901] 2 Ch. 383, overruled on this point.

THIS was a summons under the Vendor and Purchaser Act, 1874, which raised the question whether trustees for sale, who had put up to auction several houses comprised in one lease in

several lots, were entitled to complete the sale by means of an underlease of each lot for the whole of the term, less one day, at an apportioned rent. The facts so far as material were as follows:—

John Kempster, who died in February, 1887, devised and bequeathed his residuary real and personal estate to his executors and trustees, upon trust to permit his wife to take the net rents and annual income thereof during her life, and after her death the testator directed his said executors and trustees to sell the whole of his said residuary real and personal estate and invest the same as therein mentioned.

In June, 1905, the trustees of the will put up for sale by public auction, with other property of the testator, five leasehold houses, Nos. 40, 41, 42, 43 and 44, Lorrimore Square, in five separate lots, being lots 13, 14, 15, 16 and 17, subject to certain printed particulars and conditions of sale.

Lot 13, No. 40, Lorrimore Square, was stated in the particulars of sale to be "held with lots 14, 15, 16 and 17, under a lease for ninety-two and a half years (less ten days) from March 25, 1853, at an entire ground rent of 28*l.* per annum, of which 5*l.* will be apportioned to this lot."

There was a similar statement and apportionment of rent with reference to lots 14, 15, 16 and 17, except that 8*l.* was the rent apportioned for lot 17.

The 5th condition of sale provided that the title to lots 13, 14, 15, 16 and 17 should commence "with the lease (being an underlease) dated December 30, 1853, under which these lots are held."

The 11th condition provided that as lots 13, 14, 15, 16 and 17 were all held under this same lease at an entire rent of 28*l.*, such rent should be apportioned between those lots in the sums mentioned in the particulars; that if all these lots were sold at the present sale the purchaser of the largest in value of such lots, or in the event of equality of purchase-money, the purchaser of the first lot should take an assignment of the lease, upon trust to execute an underlease to the respective purchasers of the other lots, of their respective lots for the whole term, less one day, at the said apportioned rents and under and subject to

C. A. 1906

JUDD AND POLAND AND SKELCHER'S CONTRACT, *In re.*

covenants by the respective underlessees and conditions, corresponding, so far as applicable, with the covenants by the lessee and conditions contained in the original lease; but that if any of these lots remained unsold "the vendors will grant to the purchaser or respective purchasers of the lot or lots sold such an underlease as aforesaid of each of the lots sold. The vendors being trustees will not enter into any covenants in the assignments or any underleases to be granted by them under this condition except the usual covenant against incumbrances, with the addition in any underlease of the usual restricted covenant for quiet enjoyment and an acknowledgment for production of the original lease."

Lot 13 was the only one of these five lots sold at the auction. When the abstract of title was delivered the purchaser took the objection that the trust for sale in John Kempster's will did not authorize the vendors to grant an underlease of any part of the testator's property; as this objection was insisted upon, the vendors took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the purchaser's objection was not a valid objection, and that a good title had been shewn in accordance with the contract.

This summons was heard by Warrington J. on August 3, 1905, when he considered the case covered by *In re Walker and Oakshott's Contract* (1), and he accordingly allowed the purchaser's objection, and dismissed the summons with costs, ordering the contract to be rescinded and the deposit returned, as was done in *In re Walker and Oakshott's Contract.* (1)

The vendors appealed.

Levett, K.C., and *G. Welby King*, for the appellants. Where leasehold property held under one lease is sold in lots, conditions of sale like the present only follow the old-established and well-recognized method of carrying out the sale. The transaction in substance is not a granting of several underleases, but a sale; it is the well-known conveyancer's expedient referred to by Stirling J. in *In re Webb.* (2) Practically this is the only way of selling several leasehold houses held under one lease in lots:

(1) [1901] 2 Ch 383. (2) [189 1 Ch. 144, 149.

Davidson's Conveyancing Precedents, 4th ed. vol. i. p. 701, where condition 17 is practically the same; Key & Elphinstone's Conveyancing Precedents, 8th ed. vol. i. p. 293; Dart's Vendors and Purchasers, 7th ed. p. 191. The vendors in this case are trustees carrying out the ordinary trust for sale, and therefore, by the Trustee Act, 1893, s. 13, are authorized to sell by auction subject to "any such conditions respecting title . . . . or other matter" as they think fit. The point, therefore, is left open to the trustees to decide how best they shall carry out their duty, and they propose to carry out the sale in the usual way, as recognized by all the conveyancing authorities. *In re Walker and Oakshott's Contract* (1), which Warrington J. considered binding upon him, is inconsistent with the recognized practice of conveyancers in cases like the present, and is based on a misapprehension of the liability of the trust estate.

P. O. Lawrence, K.C., and *E. S. Ford*, for the purchaser. This is not a valid exercise of the trust for sale, because it is an underlease and not a sale. The distinction is one of substance, because the trustees, by granting an underlease, do not get rid of their liability under the covenants of the original lease, and would be entitled to indemnity out of the trust estate in respect of this liability. The purchaser will have to be prepared to shew in years to come that these vendors had a power of leasing, otherwise his title may be impeached on the ground that this sale was not warranted by the terms of the trust. If this proposed underlease is to stand, it must be by virtue of some power of leasing, and these trustees have no such power. Wolstenholme's "Conveyancing Forms" suggests a way out of this difficulty, and in a note at p. 36 the author says that the method adopted here cannot be carried out where the vendors are trustees under an ordinary trust for sale, and cites *In re Walker and Oakshott's Contract* (1), which, we submit, is a correct view of the law. A trust for sale is inconsistent with the grant of an underlease, and this case is within *Evans* v. *Jackson*. (2)

[Cozens-Hardy L.J. That was the case of a real lease; the trustees were not purporting to sell at all.]

An underlease by an administrator with an option to purchase

(1) [1901] 2 Ch. 383. (2 (1836) 8 Sim. 217.

C. A. 1906

JUDD AND POLAND AND SKELCHER'S CONTRACT, *In re*.

was held to be a breach of trust in *Oceanic Steam Navigation Co.* v. *Sutherberry*. (1)

[COZENS-HARDY L.J. That, again, was a real underlease.]

If trustees can grant leases because it is expedient or as a device for carrying out a sale, it seems unnecessary to give them special powers of leasing. If the whole lease were assigned to a purchaser and he granted the sub-leases, that would work properly, but the trustees have no right to grant underleases.

[COZENS-HARDY L.J. Then trustees can never sell the first lot in a case like the present. How are they to carry out a sale except by underleases in this way?]

The present method is not within the contemplation of the ordinary trust for sale.

COLLINS M.R. Romer L.J. will deliver the first judgment in this case.

ROMER L.J. In this case the trustees for sale of certain leasehold property, which comprises several houses, sold, in exercise of their trust, by public auction, those houses in several lots. The conditions of sale provided that if all the lots were sold at the sale then the purchaser of the most valuable lot, or in the event of equality of purchase-money, the purchaser of the first lot in order of sale should take an assignment of the leasehold property as a whole, and should then grant underleases to the purchasers of their respective lots for the term of the original lease, less one day, at the apportioned rents, which according to the conditions of sale had been apportioned as between the different purchasers. Now, stopping there, I do not suppose it can be said that there is any objection to that condition of sale, and if all the lots had been sold, and the purchasers of the different lots had completed according to that part of condition 11, no objection could have been taken to any of the sales. But then in a case of this kind it is necessary for the trustee who is selling in lots to consider what is to be done in case all the lots are not sold, and that some time may elapse before the sale of the whole of the lots can be completed, and what has to be done

(1) (1880) 16 Ch. D. 236.

with regard to the case of a purchaser or purchasers of any lot or lots at the public auction. Now the rest of condition 11 was applicable to that state of things, and was the usual (to my mind) and well-known condition, viz., that should any of the lots remain unsold at the present auction, "the vendors will grant to the purchaser or respective purchasers of the lot or lots sold such an underlease as aforesaid of the lot sold." That is to say, they purported to carry out the sale by auction in lots as best they could so far as the lots actually sold were concerned, and then delay to a future time the completion of the sale of the remainder of the leaseholds. The question is, Is that last condition invalid and not within the powers of the trustees for sale to insert as a condition in the sale by them? In my opinion there is no sufficient reason for holding it is not within their powers. The trust for sale in the present case was in the ordinary form; but under the Trustee Act of 1893, s. 13, it is provided that where a trust for sale is vested in a trustee he may sell either together or in lots all or any part of the property by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit. These are very general words, and I should be loth to cut down their generality, so long as trustees, in availing themselves of the provisions of the Act, do not do anything that would be unreasonable in their capacity of trustees for sale.

Now, seeing that these conditions of sale are at the present day ordinary and usual conditions of sale, well known to conveyancers for the purpose of carrying out a sale of properties all comprised under one lease when selling by lots, it appears to me that it ought not to be said that the trustees are acting improperly or beyond the powers conferred upon them by the statute when they use such conditions as these. It is not as if there was any extra liability cast upon the trust estate by their doing so. I might almost say if they do not sell by some such conditions as these, I do not know on what other conditions they could possibly sell. I do not mean to say they might not have framed other conditions, but I am not aware of any other conditions that would be so convenient to the trust estate or which would cast less responsibility upon it. These trustees were

C. A. 1906

JUDD AND POLAND AND SKELCHER'S CONTRACT, *In re.*

Romer L.J.

using conditions of sale which, to my mind, were best adapted to carry out the trusts and conditions within their powers. In any case, whether they sold under conditions such as we have here, or whether they sold under any other conditions allowing for an assignment with cross powers of distress, or otherwise, of the lots sold, so long as the trustees retain the rest of the property that had not been sold, so long does their liability to the landlords continue. In substance the same liability existed whether they had carried out the sale in the present case of the one lot sold by means of an absolute assignment, or whether they did it by means of underlease. The only objection that can be made to the conditions of sale in the present case as to an underlease being granted direct by the trustees for sale, when only one lot is sold at the auction, is that in form it is an underlease, and it is said that underleases are not justified. I may take it that an underlease in substance is not justified, but where an underlease is a pure matter of a conveyancer's expedient, a method of conveyancing for carrying out a sale, then I cannot see that there is any valid objection to it, especially as I have pointed out that this conveyancer's expedient is the best known method of carrying out such a sale, and the best for the trust estate. As Stirling J. pointed out in the case of *In re Webb* (1), with regard to such an underlease as I am now considering: "Is it a lease? In a sense, no doubt, it is a lease, but in truth it is a sale. It is described as a sale in the conditions of sale, and it is so described in the plaintiffs' bill of costs. It is a sale carried out by an underlease, which is a well-known conveyancer's expedient, where the property sold is held with other property under one lease, to avoid an apportionment of the rent, about which there might be a difficulty with the superior landlord." That, in my opinion, really disposes of this case. It is said there is a hardship upon the purchaser; he may have a difficulty in proving on a subsequent sale by him that this underlease in form was a sale in substance. The answer is, The form of the conveyance would shew that. It would, if properly drawn, recite the contract for sale, the conditions of sale, and that it was carried out in this manner as part of the conditions of sale. It would shew a sale

(1) [1897] 1 Ch. 149.

effected and carried out by that mode of conveyance. It appears to me that there is no objection in substance to this sale, and that the vendors were right, and that the decision of Kekewich J., which is in substance appealed from, in *In re Walker and Oakshott's Contract* (1), cannot be upheld by this Court. The reason given in that case is, as I have pointed out, based on a misapprehension as to what really is the liability of the trust estate in such a case as this, and for these reasons I think the appeal ought to be allowed.

COZENS-HARDY L.J. This appeal, though in form from Warrington J., is really an appeal against a decision of Kekewich J. in *In re Walker and Oakshott's Contract.* (1) It seems to me it may be disposed of on a very short and simple ground. Trustees who are either authorized or directed to sell may sell in the manner pointed out by s. 13 of the Trustee Act, 1893. They may sell in lots, and if they may sell in lots they, it seems to me, may sell adopting the usual, the proper, I may almost say the necessary, mode of selling the property.

In a case like this, where there is one leasehold which is split up into several lots, I have asked in vain for an answer to the question, How else can the trustees sell one lot, and one lot only, if there is no bidder for the remaining lots of the property comprised in the lease? In the language of Stirling J. (as he then was), this condition simply adopts what is a well-known conveyancer's expedient; and I think it is a fallacy to say, because trustees for sale are not authorized to grant a lease, that they have not power in a case like this to carry out the sale by means of that which is a mere piece of machinery, viz., the grant of an underlease with a nominal reversion, which is something wholly distinct from what I have, in the course of the argument, ventured to call a real underlease. Nor am I pressed with the difficulty which a purchaser from the present purchaser may be said to have; I think that would be entirely met by the conveyance being so framed as to shew how the property was put up for sale, this lot having a rent apportioned to it, and that for the purpose of carrying out the sale of the said lot the underlease

(1) [1901] 2 Ch. 383.

C. A. 1906 JUDD AND POLAND AND SKELCHER'S CONTRACT, *In re.*

was granted for the whole term, less one day. For these reasons, with great respect to Kekewich J., I think his judgment in *In re Walker and Oakshott's Contract* (1) ought not to be supported, and that this appeal must be allowed with the usual consequences.

Solicitors: *C. G. Algar; J. Gamble.*

W. C. D.

C. A. 1906 *March* 22, 23; *April* 2.

In re TUCK.
MURCH *v.* LOOSEMORE.

[1905 T. 740.]

Practice — Contempt — Attachment — Trustee — Disobedience of Order to pay Money—Service of Order—Presence when Order was made—Rules of the Supreme Court, Order XLI., *r.* 5; *Order* XLIV., *r.* 2.

A writ of attachment will not usually be issued against a trustee for disobedience of an order directing him to pay money into Court unless the order has been personally served upon him. The fact that the order was made by consent, and that he was in Court when it was made and initialled one of the briefs, will not make personal service unnecessary unless it is shewn that he is evading service.

APPEAL from Warrington J.

On May 18, 1905, an action was commenced for the administration of the estate of Elizabeth Bayley Tuck, of whose will the defendant, Robert Francis Loosemore, was the sole surviving trustee. On December 5, 1905, an order was made by consent that the defendant should on or before January 1, 1906, lodge in Court the sum of 1123*l.* 12*s.* 4*d.*, described in the lodgment schedule as "proceeds of sale of 835*l.* London and North Western Railway debenture stock appointed and bequeathed by the will of Elizabeth Bayley Tuck to the plaintiffs," and deposit certain documents at a bank. The defendant was present in Court and represented by counsel when the order was made, and he himself initialled the indorsement on one of the briefs.

The order was passed and entered on January 1, 1906, the day on which the payment was ordered to be made. It was

(1) [1901] 2 Ch. 383.

personally served on the defendant on January 2, with the usual indorsement on it giving notice to the defendant that he would be liable to process of execution if he did not comply with it within the time limited. The defendant did not pay the money into Court, and on January 10 notice of motion was given to him by the plaintiffs for liberty to issue a writ of attachment against him for contempt in not complying with the order. It was proved that the 1123*l.* 12*s.* 4*d.* was money in the hands of the defendant of which he was trustee.

On February 2 Warrington J., following *Hyde* v. *Hyde* (1), held that, inasmuch as the defendant was present when the order was made, personal service of it was unnecessary, and the fact that it was served after the day fixed for payment was immaterial, and he directed the writ to issue, but to lie in the office for three weeks. On February 24 the writ was issued, and the defendant was shortly afterwards lodged in Exeter Gaol. On March 5 the 1123*l.* 12*s.* 4*d.* was paid into Court, and the defendant obtained an order for his discharge from custody. He now appealed against the order of February 2, and asked that if necessary the order of December 5, 1905, might be set aside or varied.

The *Appellant* in person. The order was served too late, and the writ of attachment ought not to have been issued. Where a certain time is limited by an order for doing the act required the order must be served within that time, otherwise the proceedings to enforce it will be set aside: *Duffield* v. *Elwes* (2); *Adkins* v. *Bliss.* (3) A writ of attachment will not be issued without personal service of the notice of motion or some evidence of a reason for not effecting personal service: *Mann* v. *Perry.* (4) The affidavit in support of the application should prove service of the order, and that the copy served was duly indorsed under Order XLI., r. 5: *Stockton Football Co.* v. *Gaston.* (5) It is well settled that a notice of motion to commit must be personally served upon the contemnor: see the cases cited in the note to Order XLIV., r. 1, Annual Practice, 1906, p. 587. His appearance

(1) (1888) 13 P. D. 166, 171.
(2) (1840) 2 Beav. 268.
(3) (1858) 2 De G. & J. 286.
(4) (1881) 50 L. J. (Ch.) 251.
(5) [1895] 1 Q. B. 453.

C. A. 1906

TUCK, *In re.* MURCH *v.* LOOSEMORE.

at the hearing is not a waiver of the right to personal service: *Mander* v. *Falcke*. (1) Forms must be strictly complied with when the liberty of the subject is at stake: *Townend* v. *Townend*. (2)

Owen Thompson, for the plaintiffs. It is true that personal service was not effected, but it was unnecessary, for Mr. Loosemore was in Court at the time when the order was made: *Hyde* v. *Hyde*. (3)

[COLLINS M.R. That is only a dictum. There is no decision that hearing the order made is equivalent to service.]

Knowledge is higher than service. Presence when the order is made makes the knowledge first-hand instead of hearsay. Service is unnecessary where there is knowledge; and indorsement of the copy of the order under Order XLI., r. 5, is only required where there has to be service. Several orders which do not require service are mentioned in the notes to that rule in the Annual Practice. Personal service is not a necessary preliminary to a sequestration order: *Allen* v. *Allen* (4); nor to a writ of attachment where knowledge is shewn: *Kistler* v. *Tettmar* (5), in which the dictum of Cotton L.J. in *Hyde* v. *Hyde* (3) was approved. A litigant present in Court is deemed to have the fullest notice of the proceedings, and of the penalty for disobedience to the order. The Court has explained that *Townend* v *Townend* (2) is not to be taken as a precedent. (6)

[COZENS-HARDY L.J. That note only means that it is not to be taken as a precedent in cases in the Divorce Division. The case was argued here on the footing that the practice in that Division was the same as here. Afterwards we were told that it was different. We did not in any way depart from our view of the rules in question in any case to which they applied.]

The *Appellant* in reply.

Cur. adv. vult.

April 2. COZENS-HARDY L.J. read the judgment of the Court (Collins M.R. and Cozens-Hardy L.J.) as follows:—This appeal raises an important question of practice, although in the events

(1) [1891] 3 Ch. 488.
(2) [1905] W. N. 158.
(3) 13 P. D. 166, 171.
(4) (1885) 10 P. D. 187.
(5) [1905] 1 K. B. 39.
(6) [1905] W. N. 178.

which have happened it is only a matter of costs which has to be dealt with by us. [His Lordship stated the facts and continued:—] The learned judge held that the objection that the order had not been served until after January 1 was not a good objection, because the defendant was present in Court when the order was made, and therefore personal service was unnecessary. In support of this view the learned judge referred to *Hyde* v. *Hyde* (1), where Cotton L.J. said (2): "It is true that as a general rule no order will be made for sequestration or attachment unless it can be shewn that there has been personal service of the order disobeyed, but there are exceptions to that rule. If it were proved, for instance, that the person was actually in Court at the time the order was made, service would be unnecessary in order to obtain process for contempt, and personal service is also dispensed with if it is shewn that the reason why there has been no personal service is that the person to be served has evaded service." The observation of Cotton L.J. upon which the learned judge relied was not necessary for the decision of the case in which it was made, but nevertheless it is a clear dictum by Cotton L.J., and one which deserves careful consideration. It was not suggested to us that there was any reported case in which this dictum had been acted upon, and it is not easy to understand on what ground the cases where a defendant evaded service of an order of which he had notice came to be discussed at all if the fact of notice, apart from evasion, could be deemed sufficient to dispense with service of the order. *Hyde* v. *Hyde* (1), above referred to, and *Kistler* v. *Tettmar* (3) are instances of this. Nor is it easy to see why any special virtue should be attached to notice derived from being present in Court, as compared with other notice of a much more full and formal kind. It was, however, suggested that the settled practice of the Court is in favour of the view that the order need not be served "if the Court is satisfied that the person to be served is aware of the order." This is the statement in the Annual Practice, p. 592, but the authorities cited do not justify it. In order to ascertain what

(1) 13 P. D. 166. (2) 13 P. D. 171.
(3) [1905] 1 K. B. 39.

C. A. 1906 — TUCK, *In re.* MURCH *v.* LOOSEMORE.

has been the settled practice we thought it desirable to consult Mr. Pemberton, the senior registrar, who has been good enough to send us a memorandum, of which the following is the material part: "The practice in the registrar's office where an order has been made for a person to do an act within a limited time is to require that the order be personally served for the purposes of founding a motion for an attachment, except in cases of orders for discovery or inspection (Order xxxi., r. 22), or where an order for substituted service has been made (Order lxvii., r. 6), or where, in the opinion of the Court, the service has been evaded; and it has not been the practice to make an exception on the ground that the person ordered to do the act was aware of the order. The service of the order after the time limited has expired for doing the act required is not a good service." Under these circumstances we think the order for attachment was not properly made, and the plaintiffs must pay the costs here and below. We understand that the money in fact has been since paid into Court. It must not for a moment be understood that any doubt is cast by us upon the result of disobeying an order not to do a thing of which notice can be proved to have reached a defendant. But there is a wide distinction between such an injunction and an order commanding the defendant to do something within a definite time. Order xli., r. 5, deals only with an order of the latter class, and, for the protection of the liberty of the subject, requires the indorsement of a memorandum warning the defendant that the consequence of not complying with the order may be the issue of an attachment. There is no such requirement where the order is prohibitive only. With reference to the difficulty which may arise, as in the present case, from delay in perfecting the order, it is usual to insert after the fixed date the words "or subsequently within four days after service." It is desirable that some such words should be inserted by the registrar as a matter of course, and without any express instructions. The necessity of a further supplemental order enlarging the time will thus be avoided.

Solicitors: *A. F. Bryant; Edgar Robins & Clark.*

H. C. R.

In re BOURNE.
DAVEY *v.* BOURNE.

[1904 B. 4724.]

C. A.
1906
KEKEWICH J.
March 23.
C. A.
April 4.

Attachment — Contempt — Disobedience of Order to pay Money — Fiduciary Capacity — Possession or Control — Debtor Executor — Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

A debtor who is appointed executor by his creditor, and who proves the will, is deemed in equity to have paid the debt to himself as executor, and to have the money in his possession in a fiduciary capacity as assets belonging to the testator's estate, and, therefore, where an order is made against him in an administration action declaring him accountable for the debt as assets in his hands belonging to the testator and ordering him to pay within a given time, and he makes default, he is liable to attachment under s. 4 of the Debtors Act, 1869; but *semble*, the Court in the exercise of its discretion will not make an order for attachment against him when he is not morally blameworthy in the matter, as where he never had any means available for payment of the debt, or where, being insolvent, he honestly seeks the protection of the Court of Bankruptcy.

Where a debtor executor who had disobeyed an order of a Court of Equity for payment of the debt had, since his appointment as executor, means available for payment, but had denuded himself of his property and filed a petition in bankruptcy for the purpose of evading payment:—

Held (affirming the decision of Kekewich J.), that the Court had jurisdiction to make an order for attachment against him, and that the order ought to be made.

Dictum of Malins V.-C. in *Metcalfe's Case*, (1880) 13 Ch. D. 815, 820, overruled.

In re Woodward, (1886) 30 Sol. J. 753, explained and distinguished.

Motion for attachment.

Thomas Bourne, the testator in the action, by his will dated August 25, 1900, appointed the plaintiff, A. B. Davey, and the defendant, Joseph Bourne, his executors, and left all his property to the plaintiff, Alberta Bourne, and he died on May 18, 1904. On the death of the testator the defendant, who was the testator's nephew, was indebted to him in the sum of 2131*l.* 17*s.* 3*d.* (secured as to 2000*l.* by four promissory notes for 500*l.* each given by the defendant to the testator in September, 1902) for

C. A. 1906

BOURNE, *In re.* DAVEY *v.* BOURNE.

advances made by the testator to the defendant for the purpose of setting him up in a farm. The defendant refused to pay this debt and denied his liability to the estate.

On August 6, 1904, the plaintiff Davey brought an action against the defendant in the King's Bench Division for recovery of the money, but this action was allowed to drop owing to the fact that the debtor being also executor could not be sued at common law. On November 19, 1904, the plaintiffs commenced this action against the defendant in the Chancery Division for recovery of the debt and for administration if and so far as necessary. The defendant pleaded that the advances made to him by the testator were intended as free gifts, but Joyce J., before whom the action was tried, rejected this defence and held that the plaintiffs were entitled to payment.

By the judgment in the action dated July 18, 1905, the Court declared that the defendant was "accountable for the sums of two thousand pounds and one hundred and thirty-one pounds seventeen shillings and threepence, making together two thousand one hundred and thirty-one pounds seventeen shillings and threepence, in the pleadings mentioned as assets in his hands belonging to the estate of the testator Thomas Bourne," together with interest thereon, and ordered the defendant within fourteen days after service of the judgment to pay the said 2131*l.* 17*s.* 3*d.* and interest into Court. This judgment was personally served on the defendant on August 14, 1905, and it had not been complied with. The plaintiffs now moved for leave to issue a writ of attachment against the defendant for his alleged contempt in not paying the money into Court in pursuance of the judgment.

The plaintiffs' case was that the defendant had wilfully denuded himself of all his property for the purpose of evading payment of this debt.

It appeared that in the early part of 1905 the defendant sold all his farming effects for 2350*l.* 11*s.* and received 574*l.* for the tenant right of his farm, and that out of these moneys he paid all his creditors except the plaintiffs. In April, 1905, he surrendered a policy of insurance for 500*l.* on his own life in the Scottish Equitable Life Assurance Society and took up a policy

for 700*l.* in the same office for the benefit of his wife with a view to securing it against the plaintiffs. Finally on August 26, 1905, he was adjudicated a bankrupt upon his own petition. From the debtor's statement of affairs it appeared that the plaintiffs were his sole creditors for the amount of the judgment debt, 2131*l.* 17*s.* 3*d.*, and that his assets amounted to 45*l.*

The motion was heard before Kekewich J. on March 23, 1906.

P. O. Lawrence, K.C., and *J. W. Greig*, for the plaintiffs. Where the debtor of a testator becomes his executor the debt is extinguished at common law, because he is both the person to receive and the person to pay the money, but he is accountable in equity on the footing that he is deemed to have paid himself, and has the money in his possession in a fiduciary capacity, as is shewn by the form of order in this case; and if he makes default, he is liable to attachment under the third exception of s. 4 of the Debtors Act, 1869—at any rate where he has been guilty of dishonesty: *In re Smith.* (1) Here the defendant, having money in his hands available for payment, has acted dishonestly in denuding himself of his property and in seeking the protection of the Bankruptcy Court for the purpose of avoiding payment. In *In re Hickey* (2) Kay J. declined to make an order for attachment against an executor debtor, because the sum which he was ordered to pay was compounded partly of principal and partly of interest, and the executor could not be said to have in his possession so much of the sum as represented interest, but the judgment shews that if the sum had represented principal only the defendant might have been attached. *In re Woodward* (3) appears at first sight to be against that view, but, first, the order in that case was merely for the payment of a sum of money, and contained no declaration such as is to be found in this case that the money was assets in the hands of the executor; and, secondly, the learned judge treated the question as one of discretion and came to the conclusion on the merits that it was not a proper case for an order for attachment. If that case intended to decide as a general proposition

(1) [1893] 2 Ch. 1, 18. (2) (1886) 35 W. R. 53.
(3) 30 Sol. J. 753.

C. A. 1906 BOURNE, *In re.* DAVEY *v.* BOURNE.

that an executor who was a debtor to the testator's estate could not be attached it requires reconsideration: see Oswald on Contempt, 2nd ed. p. 110. In *Preston* v. *Etherington* (1) the order contained an admission that the debtor had the money in his hands, and on his making default of payment the Court made an order against him for attachment upon the ground that the question of his liability was concluded by the form of the order. So here it is submitted that the defendant cannot go behind the order.

Stewart-Smith, K.C., and *W. H. Stevenson*, for the defendant. A debtor who is appointed executor to the creditor is deemed in equity to have paid himself and is accountable for the debt as assets in his hands: Williams on Executors, 10th ed. vol. i. p. 1056; *Freakley* v. *Fox* (2); but although he is accountable on that footing that is not the same thing as saying that the money is in his hands in a fiduciary capacity. The obligation is merely to collect the debt, and at no time has this defendant made himself responsible for any particular sum to answer his debt. *In re Woodward* (3) is an authority in the defendant's favour, and shews that the Court will go behind the order to examine the circumstances under which the debt was incurred. There is also a dictum of Malins V.-C. in *Metcalfe's Case* (4) directly in point, to the effect that a debt due from an executor who had incurred the debt in the testator's lifetime is not money in his hands in a fiduciary character. The defendant may be made liable for a breach of his obligation to collect, but that is not within the exception in s. 4 of the Debtors Act, 1869: *Ferguson* v. *Ferguson*. (5) Further, the bankruptcy of the defendant is an answer to this motion: *Phosphate Sewage Co.* v. *Hartmont*. (6) *Preston* v. *Etherington* (1) is distinguishable, because that was a consent order, and the Court held that the defendant was bound by his own admission. In *In re Hickey* (7) the Court went behind the form of the order and found that the debt was originally incurred by the defendant while acting in a fiduciary capacity,

(1) (1887) 37 Ch. D. 104.
(2) (1829) 9 B. & C. 130.
(3) 30 Sol. J. 753.
(4) 13 Ch. D. 815, 820.
(5) (1875) L. R. 10 Ch. 661.
(6) (1877) 25 W. R. 743.
(7) 35 W. R. 53.

and if it had been a case of a simple debt it is clear from the judgment that the Court would not have attached the defendant apart from the objection as to the inclusion of interest in the sum to be paid.

KEKEWICH J. This is an action for the administration of the estate of one Thomas Bourne, and the plaintiffs are now moving for leave to issue a writ of attachment against the defendant, Joseph Bourne, for non-obedience to the judgment made by Joyce J. on the trial of the action. That judgment directs payment of a certain sum of money into Court by Joseph Bourne, and it has not been paid, and, therefore, he is admittedly in default. If it is a mere debt, of course the motion fails. In order that it may succeed the plaintiffs must bring it within the third exception to s. 4 of the Debtors Act, 1869, where imprisonment for debt is still reserved in the case of default by a trustee or person acting in a fiduciary capacity ordered to pay by a Court of Equity any sum in his possession or under his control. In the large majority of cases of this class which come before the Court there is nothing to be done, in order to see whether the case falls within the exception or not, but to refer to the order under which the defendant is liable to pay. Where the order expresses on the face of it the position of the defendant as trustee, or his occupying a fiduciary character, the Court does not allow him to go behind that, and to say that notwithstanding the order he really did not occupy that position. That is the settled practice of the Court, and is illustrated by the case of *Preston* v. *Etherington* (1) before myself and the Court of Appeal.

I turn, therefore, in the first instance, to the order. If I find that conclusive, then I need not go any further. If I find it inconclusive, then I am bound to inquire whether the debt which is sought to be thus enforced is really a debt owing by the defendant in a fiduciary character or not. The judgment on the trial of the action contains a declaration as regards the liability of the defendant. [His Lordship read the judgment.] Now does that treat him as owing the money in a fiduciary character? The language, to my mind, from that point of view is ambiguous.

(1) 37 Ch. D. 104.

C. A. 1906 BOURNE, *In re.* DAVEY *v.* BOURNE. Kekewich J.

I think it is quite open to the defendant to say that there is no declaration of a fiduciary character there. The declaration is that he is accountable, but an executor or trustee or other person holding a fiduciary character is accountable, not only for what he has in his hands, but for that which he has in the hands of agents, and sometimes, under special circumstances, for that which he ought to have received, and which, but for what is called his own wilful default, he might have received. The accountability does not conclude the question whether he has actually received the money or not, and unless it has been held to be in his hands or to be in his possession or under his control the Court cannot enforce that liability by attachment. But the judgment does not say merely that he is accountable for it. It says that he is accountable for these moneys as assets in his hands belonging to the testator's estate. That goes a little further. On the true construction of the judgment—and certainly if there is an ambiguity, as I think there is, on a benevolent construction of the judgment—I think I ought to hold in favour of the defendant that it does not conclude the question. If that be so, I cannot send a man to prison for disobedience to that judgment without going further, because I must be satisfied that the money is in his possession or under his control in a fiduciary character. As to the fiduciary character really there cannot be much room for dispute. Whatever he owes he owes as executor—he owes it in no other character—and that is of course fiduciary, whatever it is. Therefore the real question is whether this sum is due from him at all in the sense that it can be said to have been in his possession or under his control.

Now we must go back and find out what the foundation of this judgment is. It appears that as regards the bulk of the debt his indebtedness to the estate arises in this way. The testator in his lifetime advanced him a certain sum of money, for which he gave ultimately four promissory notes. He was a debtor to the testator for whatever was due on those promissory notes—a mere debtor. When the testator died and he became executor he was in the position of a debtor appointed executor. The position as regards his liability to the estate is thus

described in a passage in Williams on Executors, 10th ed. vol. i. p. 1056: "The effect in equity, of the appointment of a debtor to the office of executor, is, as there has already been occasion to state, that the debt due from the debtor executor is considered to have been paid to him by himself; and upon this supposition it is an established rule in equity that the executor shall be accountable for the amount of his debt as assets." The practice is clearly settled, and the reason mentioned for it by the learned editor is supported by a passage in the judgment of the Court in *Freakley* v. *Fox*. (1) Can the Court send a man to prison simply because being executor he is also a debtor? That point was decided by Malins V.-C. in *Metcalfe's Case* (2), and also by Stirling J. in *In re Woodward*. (3) In that case we have the advantage of having the order on which Stirling J. was asked to act, as in this case of *Davey* v. *Bourne* I have the order before me. That was an order on Henry John Woodward to make the lodgment into Court directed by the schedule on or before July 2, 1886, or subsequently within four days after service of this order, and that appears to be simply the debt due from John Woodward to the estate. The learned judge declined on that to allow a writ of attachment to issue, treating him merely as a debtor. But that, to my mind, is only a small portion of the case. We are entitled to look into the circumstances. We find equity treating the debtor as having the money in his hands, that is to say, his debt, as being part of the estate for which he cannot sue himself but which he ought to pay. One is bound to look into the circumstances to see whether as a matter of fact he ought to have paid, that is to say, whether the inference of law that he has paid arising out of the peculiar double position is not to be followed up by an inference of fact that he did pay, or must be taken to have paid whether he did or not. Here we have, to my mind, conclusive evidence that the defendant had ample means to pay, and not only that he did not pay, but that he never intended to pay, and that ultimately, rather than pay, he went into bankruptcy to

(1) 9 B. & C. 130. (2) 13 Ch. D. 820.
(3) 30 Sol. J. 753.

C. A. 1906
BOURNE, *In re.* DAVEY *v.* BOURNE.
Kekewich J.

defeat these particular creditors, and left them to obtain what dividend they could. The Court of Appeal in *In re Smith* (1), dealing with the case of a man who they considered ought not to be attached because he had not been brought within the exception, said: "Andrews trusted his co-trustee Hooton, and handed money to him, and this money was misapplied. Andrews is liable for it; but he was not himself guilty of any dishonesty or fraudulent breach of trust." If he had been guilty of dishonesty or fraudulent breach of trust he would have gone to prison, notwithstanding that the money never came to his hands, because he allowed it to remain in the hands of a co-trustee, and was therefore responsible together with that co-trustee, who, in that particular case, was held to be fraudulent. We may dismiss fraudulent breach of trust, because there is nothing of that kind here—at least, it is not the proper phrase applicable to this case. Now, has this defendant been dishonest? He did not pay his debts. So far as I am aware, there is no authority, either in law or in the common sense of society, for holding that it is dishonest not to pay your debts. There may be very good reason for not paying your debts; at any rate that, standing alone, cannot be regarded as dishonest. Nor can it be regarded as dishonest to seek the aid of the Court of Bankruptcy for the purpose of securing the distribution of the assets among all the creditors equally. On the contrary, it is sometimes the only honest thing for an innocent debtor to do. But it is dishonest to incur debts which you know you cannot pay, and, in my opinion, it is equally dishonest not to pay debts when you have the means to pay them. There is no excuse whatever for that. Here we have a man who, as executor, was possessed of ample means to pay the debt at one time, without injustice to any other creditor, and who pertinaciously refused to pay. To my mind that, within the meaning of the language of the Court of Appeal, is dishonesty. The law treats the money as in his hands. The inference from the facts is that it was in his hands. It is quite impossible after the judgment of Joyce J. to treat the defendant's story as affording any excuse for non-payment. He ought to have put his hand into what I may call

(1) [1893] 2 Ch. 1, 18.

his private pocket, and to have taken the money from that and put it into what I may call his trustee pocket. C. A. 1906

If that is the right view there is no occasion for me to refer to the Act of 1878 to see whether it is a case in which I ought to exercise a discretion. It is a case where I have no occasion to consider whether there is any discretion to exercise or not. I think that the defendant has not only had the money in law, but that he has had it in fact as executor as part of the assets of the testator, and that as he has failed to pay it, he must be punished —I use that word advisedly, having regard to the decisions on the subject—by being sent to prison. BOURNE, *In re.* DAVEY *v.* BOURNE. Kekewich J.

The defendant undertaking to appeal immediately, the Court directed that the order should not be carried into execution until after the hearing of the appeal.

The defendant appealed. The appeal was heard on April 4, 1906. C. A.

Stewart-Smith, K.C., and *W. H. Stevenson*, for the defendant. Kekewich J. came to the conclusion that the defendant, since the death of the testator, had money available for payment of the debt, and must be taken to have paid the debt, and that, therefore, he had the money in his possession or under his control within the exception in s. 4 of the Debtors Act, 1869. It is submitted that the learned judge was wrong both in fact and in law. The effect of appointing a debtor executor is that at law the debt is gone but in equity the debtor is held to be accountable for the debt as assets in his hands: Williams on Executors, 10th ed. vol. i. p. 1056. But this defendant never had the money in his possession in a fiduciary capacity. He is only deemed to have paid himself so far as to make him accountable, and no order for attachment will be made merely on the ground of accountability. That a debtor who becomes executor to his creditor and fails to comply with an order for payment is not liable to attachment is shewn by *Metcalfe's Case* (1), per Malins V.-C., and *In re Woodward.* (2)

[ROMER L.J. The very form of the order by which an executor

(1) 13 Ch. D. 815, 820. (2) 30 Sol. J. 753.

C. A. 1906 — BOURNE, *In re.* DAVEY *v.* BOURNE.

is made liable shews that the dictum of Malins V.-C. must be wrong. I think there can be no doubt as to the defendant's legal liability to attachment, but the question is whether he has been guilty of moral blame.]

[COZENS-HARDY L.J. As I read *In re Woodward* (1) there was an affirmance by Stirling J. of the jurisdiction to attach and an exercise of discretion in favour of the defendant.]

The language of Stirling J.'s judgment shews that the case was not within the exception. In *In re Hickey* (2) Kay J. thought that the debt must have been originally incurred in a fiduciary capacity to justify the Court in attaching a debtor executor. It is submitted, first, that, assuming the Court has jurisdiction to order attachment, in the exercise of its discretion, it ought not to do so; secondly, that it has no jurisdiction to make the order.

P. O. Lawrence, K.C., and *J. W. Greig*, for the plaintiffs.

COLLINS M.R. This is an appeal from an order of attachment made by Kekewich J. That order was based upon the non-compliance by the defendant with a judgment made by Joyce J. at the trial of the action on July 18, 1905. [His Lordship read the judgment and continued:—] The defendant did not pay the money into Court in accordance with that judgment, and the matter came before Kekewich J., who ordered the attachment to go. Against that he now appeals. In point of fact the defendant was an executor of the deceased testator, and he owed this debt to the testator at the time of his death. It is true that he thought that as between himself and the testator the testator never intended him to pay back that debt. Accordingly he acted on that view and never paid the debt, although he had effects in his hands out of which he might have paid it. At first he was sought to be made liable at common law, but that action was not maintainable and was dropped, and finally proceedings were taken against him in equity which resulted in the judgment of Joyce J. That judgment contains a statement that the sum due was assets in the hands of the defendant, and it then proceeds to order him to pay the money into Court

(1) 30 Sol. J. 753. (2) 35 W. R. 53.

within fourteen days of service of the judgment. This application is made under clause 3 of the 4th section of the Debtors Act, 1869, which reserves the right of attachment in the case of "default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control." Now the way in which the defendant is brought under this section is this: He is an executor owing a sum of money to the testator at the time of the testator's death. Being an executor there was a difficulty about suing him at common law. He being both the person to receive and the person to pay, he could not be made responsible, but the whole matter is now governed by the rules of equity, and the executor is deemed as debtor to have paid himself in a fiduciary capacity as executor, and he is deemed to be in possession of the sum which he owed to the estate, and that is found in terms in the judgment of Joyce J. In these circumstances, default having taken place, it seems to me to be clear that this case is within the jurisdiction reserved to the Court by clause 3 of s. 4 of the Debtors Act.

Then comes the question of discretion. Now, so far as discretion is concerned, the learned judge has undoubtedly exercised his discretion and has given his reasons for exercising it, and I think that his conclusion was abundantly justified by the evidence. On looking into the details of the matter, in substance what the defendant did was this: He thought that he ought not to be called upon to pay this money, and he set up the defence that it was a free gift, and that was found to be a hopeless defence and judgment was pronounced against him. However, he decided for himself that, whatever the view of the law was, he ought not to pay, and, accordingly, he deliberately took steps to make that judgment infructuous. [His Lordship discussed the evidence and continued:—] On this evidence the learned judge, having jurisdiction to make the order, thought that he would be justified in exercising his discretion by ordering the writ of attachment to go. I entirely agree with that decision, and I think that this appeal fails.

ROMER L.J. I agree. With regard to the legal question, I have no doubt whatever but that the defendant came within the

C. A. 1906 BOURNE, *In re.* DAVEY v. BOURNE. Romer L.J.

provisions of clause 3 of s. 4 of the Debtors Act, 1869—that he was in the position of a trustee who had made default when acting in a fiduciary capacity and ordered to pay by a Court of Equity a sum of money in his possession. He was indebted to the testator in his lifetime, and by the will he was appointed executor, and he proved the will. The effect of that was that at law the debt was extinguished because there was no one to sue or be sued, but in equity he as debtor is held to have paid himself as executor, and therefore as executor to have in his possession the full amount of the debt as having been paid to him as executor. That is the view of equity, and it is on that view that he can be made liable in an action to administer the estate of the testator. It was on that view that Joyce J. found that the defendant was liable to pay the sum of money in question as being money in his hands belonging to the estate of the testator. Therefore from the legal point of view, using the word "legal" in its wider sense as including equity as well as law, the defendant having received the amount of this debt as executor, the money was in his possession as executor, and on that footing he is made liable and ordered to pay the money into Court. That being so, in my opinion it is impossible to argue, when the point is fairly considered, that he was not in view of the law a person who was a trustee acting in a fiduciary capacity and ordered to pay by a Court of Equity a sum in his possession. To my mind the matter is clear beyond argument, or would be so were it not for the dictum of Malins V.-C. in *Metcalfe's Case*. (1) That was a mere obiter dictum, which, except by way of illustration, had nothing whatever to do with the case before him, and that dictum appears to me to be unfounded. We were also referred to some observations reported to have been made by Stirling J. in *In re Woodward* (2), of which the only note is to be found in the Solicitors' Journal. I have looked at the observations there attributed to Stirling J., and it seems to me to be clear that he was dealing with that case as a case in which he had jurisdiction to commit, but in which the question was whether, in the exercise of his discretion, he ought to make the order. That will be seen from his observations as to the circumstances

(1) 13 Ch. D. 815, 820. (2) 30 Sol. J. 753.

under which the money was received, which it would have been unnecessary to consider if he thought he had no jurisdiction. I think that the true result of that case is that Stirling J. dealt with the matter as one of discretion—that he held that, though he had jurisdiction to commit because the debtor did fall within the exception, in the exercise of his discretion it was competent for him to regard the matter, not as one of law, but as one of fact. Although at law the executor had the money in his hands in a fiduciary capacity, the learned judge proceeded to inquire whether in fact he had this money in his hands for the purpose of enabling him to exercise his discretion. I have no doubt that this debtor falls within the exception, and that there was jurisdiction to commit him if the circumstances of the case on the merits were such as to justify a committal.

I agree that in exercising its discretion in a case like this the Court ought to inquire into the facts of the case, and ought to see not only whether as a matter of law and in view of the law the executor had the money in his possession, but whether in fact and in substance he has, or ought for the purposes of committal to be treated as having, the money in his possession. For example, suppose it turned out that the executor never had any means available for payment of the debt due to the testator's estate, speaking for myself I would not, in the exercise of the discretion of the Court, order a committal. I will go further. Suppose money comes into the hands of an executor which he could apply in payment of his obligation to the testator's estate, and he finds that he is insolvent, and that he has other creditors who have the same moral right to be paid as the testator or his estate, and he then takes proceedings in bankruptcy to have his estate distributed rateably among his creditors; again, speaking for myself, in the absence of any misconduct on the part of the debtor, I should have thought that the Court ought to hold, in the exercise of its judicial discretion, that that was not a case for committal. But, looking at the circumstances of this case, I come to the conclusion that the judge was amply justified in exercising his discretion by making an order for committal. Not only had the debtor raised a contention which was incapable of sustentation,

C. A. 1906 — BOURNE, *In re.* DAVEY *v.* BOURNE. — Romer L.J.

viz., that the debt which he owed to the testator's estate was a gift, but when he saw that the claim made against him on behalf of the beneficiaries under the will was likely to result in his being beaten on that point and judgment being obtained against him, it is clear that he then realized his estate; and although by that realization he obtained money which was available for payment of this debt, he realized for the purpose of evading payment of this debt. He acted throughout with the object and intention of defeating this particular claim. The result is that, though the other creditors were paid in full, the plaintiffs were designedly left out. Looking at these circumstances, and seeing that the debtor had at one time ample means to discharge his obligation, I come to the conclusion that he has not acted in such a manner as to induce the Court in the exercise of its discretion to free him from the obligation cast upon him by law which brings him within the provisions of s. 4 of the Debtors Act, 1869. I think, therefore, that the judgment of the Court below must be affirmed.

COZENS-HARDY L.J. I am of the same opinion. It is important to keep distinct the question of jurisdiction and the exercise of discretion. On the point of jurisdiction I cannot bring myself to feel much doubt. I am disposed to think that this is not a mere rule of the old Court of Chancery, but that it is a common law doctrine as well. In *Freakley* v. *Fox* (1) the facts raised the point of law very neatly. The marginal note is as follows: "Where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note, even by a person to whom the executor has indorsed it." Lord Tenterden, in giving the judgment of the Court, said (2): "On behalf of the defendant it was contended that by the appointment of the maker to the office of executor of the creditor, the note was discharged; so that an indorsement, even by the debtor himself, could not set it up and make it a binding instrument; and we are of that opinion. The expression used in the cases of *Wankford* v. *Wankford* (3), and *Cheetham* v. *Ward* (4), is that the debt is discharged. It is considered to have been paid

(1) 9 B. & C. 130.
(2) Ibid. 133.
(3) (1702) 1 Salk. 299.
(4) (1797) 1 Bos. & P. 630.

by the executor to himself, and becomes assets in his hands," i.e., in view of a Court of law, which in many cases in an action against an executor would have to consider the question of assets. On this legal view he goes on to say: "Upon this supposition the rule in equity depends which makes the executor accountable for the amount of his debt as assets." It seems to me that the old Court of Chancery only adopted the principle of the common law and used its machinery for getting in these assets by making an order against the executor, saying that the assets were in his hands. Therefore the case is brought within the exception in s. 4 of the Debtors Act. The only suggestion to the contrary is the dictum of Malins V.-C., to which Romer L.J. has referred. I agree with him that that dictum cannot be supported, and ought not to be treated as a binding authority. Then, assuming that we have jurisdiction to attach, there comes the important and serious question of discretion. In a case of this kind I should generally be disposed to take a very liberal view in favour of a debtor executor. I agree with the illustrations which have been put by Romer L.J., but I am not prepared at all to say that in no case ought the Court to decline to exercise its discretion in favour of the debtor. In this case I think that the judge was abundantly justified in acting as he did.

Solicitors: *Miller & Smiths, for Clitherow & Son, Horncastle: Clinton & Co., for F. G. Tweed, Gainsborough.*

H. B. H.

C. A. 1906

March 27; *April* 10.

In re S. S. B. (A Person of Unsound Mind not so found by Inquisition).

Lunatic—Committee—Person of Unsound Mind not so found by Inquisition—Power exercisable by Committee under Order of Judge—Power of Sale—Land vested in Lunatic as Tenant for Life—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116, 120, 128—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 7—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 62.

The Lunacy Act, 1890, s. 116, does not empower the judge in lunacy to authorize the quasi-committee appointed under that section with regard to the estate of a person of unsound mind not so found by inquisition, to exercise, on behalf of that person, in respect of land of which he is only tenant for life, the power of sale given by s. 7 of the Lands Clauses Consolidation Act, 1845.

In re Baggs, [1894] 2 Ch. 416, n., followed.

In re X., [1894] 2 Ch. 415, and *In re Salt*, [1896] 1 Ch. 117, discussed.

Appeal from an order of Master Ambrose, K.C., as after mentioned. (1)

An order had been made by a Master in lunacy, under s. 116, sub-s. 2, of the Lunacy Act, 1890, by which, after reciting that one S. S. B., though not lawfully detained as a lunatic, nor so found by inquisition, was, through mental infirmity arising from age, incapable of managing his affairs, the wife and nephew of the said S. S. B. were authorized to exercise such of the powers of the Act as are made exercisable by the committee of the estate of a lunatic under the order of the judge. S. S. B. was the tenant for life of certain land settled by the will of his grandfather. The Great Northern Railway Company had, under the powers of a special Act, which incorporated the provisions of the Lands Clauses Consolidation Act, 1845, with regard to the purchase of land by a company, given notice to treat in respect of a portion of the above-mentioned land. The persons appointed to exercise the powers of a committee as aforesaid applied to

(1) In consequence of a difficulty in reconciling previous decisions on the subject, the appeal was ordered to be argued before the full Court of Appeal.

Master Ambrose, K.C., for an order that they might be at liberty, in the name and on behalf of S. S. B., to exercise the power of sale conferred on a tenant for life by s. 7 of the Lands Clauses Consolidation Act, 1845, and for that purpose to nominate in his name and on his behalf an able practical surveyor, pursuant to s. 9 of that Act; or that they (as the parties for the time being entitled to the receipt of the rents and profits of the lands in question) might be at liberty in their own names to exercise the power of sale conferred by s. 7, and to nominate an able practical surveyor, as aforesaid.

The Master held that he had no jurisdiction to make the order applied for, and therefore dismissed the application.

A. Adams, for the applicants. Under the Lunacy Act, 1890, s. 116, sub-s. 2, in the case of lunatics not so found by inquisition, "such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct." Under the Lunacy Act, 1890, the judge can authorize the committee of the estate to exercise any power vested in the lunatic for his own benefit: see s. 120, sub-s. (*l*); or any power vested in the lunatic in the character of trustee or guardian: see s. 128. It has been held in *In re X.* (1) that a power of sale given to a tenant for life by a settlement is a power vested in him partly for his own benefit within s. 120, sub-s. (*l*), and partly in the character of a trustee within s. 128, and therefore, by virtue of the conjoint effect of ss. 120 and 128, the judge could authorize the quasi-committee appointed under s. 116 to exercise the power of sale. Sect. 53 of the Settled Land Act, 1882, confirms the view that a power of sale is vested in the tenant for life in the character of trustee. The Lands Clauses Consolidation Act, 1845, s. 7, confers a power of sale upon a tenant for life. The power so conferred appears to come within the principle of the decision in *In re X.* (1) But a difficulty arises from the decision of this Court in *In re Baggs* (2), decided in 1893, by which it was held that the judge in lunacy could not authorize the quasi-committee of a lunatic not so found by inquisition to

(1) [1894] 2 Ch. 415. (2) [1894] 2 Ch. 416, n.

C. A. 1906

S. S. B. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re*.

exercise the power of sale conferred on a tenant for life by the Settled Land Act, 1882. It is difficult to see how that decision can be reconciled with the decision in *In re X.* (1) It has been suggested that the decision in *In re Baggs* (2) depends on the fact that s. 62 of the Settled Land Act, 1882, expressly provides for the case of lunatics so found by inquisition, and therefore excludes by implication the application of the Act to the case of lunatics not so found. But this line of reasoning is inconsistent with the decision in *In re Salt* (3), where it was held that the Court could authorize, in the case of a lunatic not so found by inquisition, the exercise by the quasi-committee of the power of leasing given to a tenant for life by the Settled Land Act, 1882. It was suggested in *In re Salt* (3) that the true ground of the decision in *In re Baggs* (2) was that a power of sale is neither a power given to a tenant for life for his own benefit, nor a power given to him in the character of trustee or guardian; but that explanation of the decision in *In re Baggs* (2) is inconsistent with the reasoning of the decision in *In re X.* (1) It has been pointed out that it is difficult altogether to reconcile these decisions: see *In re A.* (4) It is submitted that, although the decision in *In re Baggs* (2) may be a binding authority in this Court as regards the power of sale given to a tenant for life under the Settled Land Act, 1882, yet, having regard to the subsequent decisions, it ought not to be extended to the case of a power of sale given by a different statute passed for entirely different purposes, such as the Lands Clauses Consolidation Act, 1845. Sect. 7 of that Act deals with sales both in the case of lunatics absolutely entitled to land and in that of lunatics entitled to a life estate only. It cannot be disputed that, in the case of a lunatic not so found by inquisition, who was absolutely entitled, the provisions of the Lunacy Act, 1890, s. 120, sub-s. (*a*), would apply, and the quasi-committee could exercise the power of sale. It would be a strange result that the case of a lunatic not so found by inquisition, who is tenant for life, should be excluded from the operation of the Lands Clauses Consolidation Act, 1845, and there should be no means by which the

(1) [1894] 2 Ch. 415.
(2) [1894] 2 Ch. 416, n.
(3) [1896] 1 Ch. 117.
(4) [1904] 2 Ch. 328, 338.

company can obtain a title in his case. [He also cited *In re Tugwell.* (1)]

C. A. 1906

S. S. B. (A Person of Unsound Mind not so found by Inquisition), *In re.*

Cur. adv. vult.

April 10. Collins M.R. read the following judgment:—The question in this case is whether, where a tenant for life of settled lands is a lunatic not so found by inquisition, the Court can authorize the quasi-committee to carry out a sale of the settled lands under the Lands Clauses Act, 1845. I will consider the case, first, apart from s. 7 of the Lands Clauses Act, 1845, under the Settled Land Act, 1882, and the Lunacy Act, 1890. The method of legislation adopted as to the execution of powers vested in persons of unsound mind, but not found by inquisition to be lunatics, has had the effect of raising a number of puzzles for the decision of the Courts which have had to deal with this branch of the law. The result is that legislation sufficiently difficult in itself of interpretation has become still more difficult by reason of the attempts from time to time made by the Courts to solve the questions presented to them.

By the Settled Land Act, 1882, powers were conferred on tenants for life as defined by that statute to sell (s. 3) and to lease (s. 6) the settled land. In the case of persons of unsound mind, however, no provision was made for the exercise of these powers except where the lunatic had been so found by inquisition, in which case these powers might be exercised by the committee of his estate under order of the Court having jurisdiction in lunacy (s. 62). The result, therefore, up to this point was that the Settled Land Act, 1882, provided for the case of lunatics so found by inquisition, but made no provision for persons not so found.

The next step is the Lunacy Act, 1890—"An Act to consolidate certain of the enactments respecting lunatics." This Act, being, as its heading imports, a consolidating Act, repeals a vast number of prior enactments and forms a code in itself. The method by which it deals with the exercise of powers vested in lunatics not so found by inquisition is peculiar, and has been the source of much of the confusion which has crept into the decisions.

(1) (1884) 27 Ch. D. 309.

C. A.
1906
S. S. B.
(A Person of Unsound Mind not so found by Inquisition), *In re*.
Collins M.R.

Instead of enacting what powers might be exercised on behalf of persons of unsound mind not so found by inquisition, which would seem to have been the simpler course, it provides by s. 116 that the management and administration provisions of the Act are to apply to persons in a number of different categories, including lunatics so found and others not so found. It then provides (sub-s. 2) that, in case of any of the above-mentioned persons not being lunatics so found by inquisition, "such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge" shall be exercised by such person as the judge may direct. The judge's powers, therefore, to authorize the quasi-committee to act for a lunatic not so found by inquisition are measured by the powers conferred upon him by the Act itself to authorize action by the committee in the case of lunatics so found by inquisition. This compels us to ascertain what the Act empowers the judge to do in the case of a lunatic so found. This is dealt with, so far as is material to this case, in ss. 120 and 128.

Sect. 120 empowers the judge to authorize the committee to do a number of acts described under letters (*a*) to (*l*). These are all acts on behalf of the lunatic in his own right. Sect. 128 deals with powers vested in the lunatic in the character of trustee or guardian, and enables the judge to authorize the committee to exercise them. In order to invoke the judge's jurisdiction, therefore, to order the quasi-committee to exercise the power of sale as desired in this case, it must be brought under one of the heads comprised in ss. 120 and 128. Headings (*a*) and (*l*) in s. 120 are the only ones that might seem to relate to this case, but (*a*) is inapplicable, as it relates only to property belonging to the lunatic, which is not true of the fee-simple here, and (*l*) is inapplicable, as the power sought to be exercised cannot be said to be vested in the lunatic for his own benefit. Neither does s. 128 cover the case, for, unless *In re Baggs* (1) was wrongly decided, the power in question is not vested in the lunatic in the character of trustee or guardian.

The result is that, though the Settled Land Act confers a ower of sale on the tenant for life, it cannot in this case be

(1) [1894] 2 Ch. 416, n.

exercised—first, because that Act does not provide for the exercise of the power on behalf of a lunatic not so found by inquisition; secondly, because that gap has not been cured by anything in the later Act. It is not, in the words of s. 116, sub-s. 2, one "of the powers of this Act made exercisable by the committee of the estate." This, in fact, is the decision in *In re Baggs*. (1) There is, however, another decision of the same Court in *In re X*. (2), which seems difficult to reconcile with that decision. In the latter case a person of unsound mind, for whom a quasi-committee had been appointed, was tenant for life of lands under a settlement containing a power enabling each successive tenant for life in possession to sell the settled lands, and it was held that the Court had power under ss. 120 and 128 of the Act of 1890 to authorize the sale. The only differing fact in the two cases is that in *In re Baggs* (1) the power of sale was conferred by the Settled Land Act, in *In re X*. (2), by the settlement itself. If the latter is right, it involves two propositions—(1.) that the sections relied on do enable the Court to authorize the exercise of a power of sale vested in a tenant for life, notwithstanding the reasons given in *In re Baggs* (1) for the contrary conclusion; (2.) that the reason why provisions thus held capable of applying to the case of a sale of the settled lands by the committee of a lunatic tenant for life were inapplicable in *In re Baggs* (1) must be found, not in the nature of the provisions themselves, for they, of course, were identical in both cases, but in the fact that in *In re Baggs* (1) the power itself was derived under the Settled Land Act, and not under a settlement: or, in other words, that the Settled Land Act inhibited the exercise by the judge of the power conferred upon him by ss. 120 and 128 of the Act of 1890. This inhibition, if it exists, must be found in the words of s. 62 of the Settled Land Act, 1882, construed on the principle "expressio unius exclusio alterius," and the permission there given to the committee of a lunatic so found by inquisition must be construed as a statutory expression of intention that the power shall be exercised by no other person. Read in the light of such a prohibition, ss. 120 and 128 of the Act of 1890 would be limited to cases where the

(1) [1894] 2 Ch. 416, n. (2) [1894] 2 Ch. 415

C. A. 1906

S. S. B. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.*

Collins M.R.

power of sale was derived otherwise than under the Settled Land Act. The later case of *In re X.* (1) purported not to interfere with *In re Baggs* (2), and it seems to me that they cannot be reconciled except upon the line of reasoning above stated, although I confess it involves a somewhat strained construction of s. 62. There is, however, another case which must be considered before it can be decided that this method of reconciling the authorities can be adopted. That is the case of *In re Salt.* (3) It was there held that the power of leasing conferred on a tenant for life by s. 6 of the Settled Land Act, 1882, could by an order of the Court under clause (*h*) of s. 120 of the Lunacy Act, 1890, be exercised by the quasi-committee of a lunatic not so found by inquisition. This decision, if right, negatives the existence of any prohibition in s. 62 of the Settled Land Act debarring any person other than the committee of a lunatic so found by inquisition from exercising the power of leasing conferred by that statute. As s. 62 applies equally to all powers conferred by the Settled Land Act, no distinction can be made so far as that Act is concerned between the power to sell and the power to lease. If, therefore, the only hypothesis on which, as it seems to me, *In re Baggs* (2) and *In re X.* (1) can be reconciled be adopted, *In re Salt* (3) cannot stand. On the other hand, if we are content to reject *In re X.* (1), then there is no inconsistency between *In re Baggs* (2) and *In re Salt* (3), and both may stand. But on no hypothesis, as it seems to me, can all three stand together. Lindley L.J. was a party to the decision both in *In re Baggs* (2) and in *In re X.* (1), and delivered the leading judgment in both cases, and there is a difficulty, therefore, in concluding that they are irreconcilable. On the other hand, A. L. Smith L.J. was a party to the decision both in *In re Baggs* (2) and in *In re Salt.* (3) On the whole I think that the difficulty in adopting the hypothesis which alone, as it seems to me, can reconcile *In re Baggs* (2) and *In re X.* (1) turns the scale, and that the former must be taken as deciding that the power could not be exercised in that case, not because it was derived under the Settled Land Act and was thereby differentiated from a power

(1) [1894] 2 Ch. 415. (2) [1894] 2 Ch. 416, n.
(3) [1896] 1 Ch. 117.

drawn from any other source, but because nothing could be found in ss. 120 and 128 of the Act of 1890 letting in the power of the judge to authorize its exercise. If this is so, *In re Baggs* (1) and *In re Salt* (2) are harmonized, but there is an irreconcilable difference between them both and *In re X.* (3), and we must choose between them. There is some ground for thinking that the omission to empower the quasi-committee to exercise the power of sale conferred on tenants for life by the Settled Land Act was deliberate, as Fletcher Moulton L.J. points out in his judgment, which I have seen, and I am of opinion, on the whole, that the wiser course will be to follow *In re Baggs.* (1) The position of the quasi-committee is certainly no better in relation to a sale under the Lands Clauses Act than under the Settled Land Act: see *In re Tugwell.* (4) It follows that the Court cannot authorize the quasi-committees to carry out the sale.

Vaughan Williams L.J. read the following judgment:—In my judgment the Court in *In re Baggs* (1) decided, first, that neither under s. 62 of the Settled Land Act, 1882, nor under any other part of that Act, was any power given except to the committee of a lunatic so found to exercise the power of sale vested by the Settled Land Act, 1882, in a tenant for life, and therefore the Act did not give this power in the case of a tenant for life coming to be a lunatic not so found, but for the protection of whose property an order had been made under the Lunacy Act, 1890, or whose person was lawfully detained as a lunatic not so found. The fact that this s. 62, which was an enabling and not a prohibitive section, only gave such limited power clearly did not prevent the Legislature by a Lunacy Act of later date extending the right to exercise this power of sale of a tenant for life under the Settled Land Act, 1882, to persons other than the committee of a lunatic so found by inquisition. The Court, therefore, in *In re Baggs* (1) looked to see if the Lunacy Act, 1890, gave power in ss. 120 and 128 or otherwise, in the case of lunatics not so found, to the Court to order that some person other than such committee might

(1) [1894] 2 Ch. 416, n.
(2) [1896] 1 Ch. 117.
(3) [1894] 2 Ch. 415.
(4) 27 Ch. D. 309.

C. A. 1906 — S. S. B. (A Person of Unsound Mind not so found by Inquisition), *In re.* — Vaughan Williams L.J.

exercise the power of sale vested in the lunatic tenant for life not so found, and came to the conclusion that the Act of 1890 gave no such power; and I think that the conclusion in *In re Baggs* (1) was absolutely right. In the case of *In re X.* (2) the power of sale in the tenant for life was not derived from the Settled Land Act, 1882, but from a deed of settlement, and the Court, without differing in any way from the judgment in *In re Baggs* (1), was able to make the necessary order for sale. Lastly, in the case of *In re Salt* (3), the power sought to be exercised being simply a leasing power, the Court found that in respect of such power s. 120 (*h*) of the Act of 1890 gave power to the Court to order some one to exercise this leasing power for the lunatic, and in respect of this power of leasing extended the limitation arising on the construction of s. 62 of the Settled Land Act, 1882. But in the case of the power of sale vested by the Settled Land Act, 1882, in a lunatic tenant for life, s. 120 did not give this power to the Court to order some one to exercise the power of sale. I find no such inconsistency in these cases as would prevent their standing together.

Romer L.J. I have had an opportunity of reading the judgment which has been delivered by the Master of the Rolls, and I concur in it.

Stirling L.J. read the following judgment:—In this case the question is whether the judge in lunacy has power to authorize the receiver of the estate of a person of unsound mind not so found appointed under s. 116 of the Lunacy Act, 1890, to exercise the power of sale of that estate of which that person is tenant for life, when it is conferred by s. 7 of the Lands Clauses Consolidation Act, 1845. Sect. 7 authorizes (amongst other persons) tenants in tail or for life, married women seised in their own right, guardians, and committees of lunatics and idiots, to sell, convey, and release; and provides that the power so to sell, convey, and release may be exercised by all such parties, not only on behalf of themselves and their respective heirs, executors, administrators, and

(1) [1894] 2 Ch. 416, n. (2) [1894] 2 Ch. 415.
(3) [1896] 1 Ch. 117.

successors, but also for and on behalf of every person entitled in reversion, remainder, or expectancy after them, and as to such married women (whether of full age or not) as if they were sole and of full age, and as to such guardians on behalf of their wards, and as to such committees on behalf of the lunatics and idiots of whom they are committees respectively, and that to the same extent as such wives, wards, lunatics, and idiots respectively could have exercised the same power if they had respectively been under no disability. The effect of this enactment appears to me to be to confer the power of sale on tenants in tail and tenants for life when not under disability; but, as regards persons under disability, whether of infancy or unsoundness of mind, to confer the power on the guardian of the infant or the committee of the person of unsound mind. The power so conferred on guardians and committees would be available where the infant or person of unsound mind is entitled, not merely as tenant in tail or for life, but in fee; in which last case of course the owner, if not under disability, does not require and has not conferred upon him any power under the Lands Clauses Consolidation Act, 1845.

Now s. 116, sub-s. 2, of the Lunacy Act, 1890, confers on the judge in lunacy power to order that such of the powers of that Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by the receiver. Sect. 120 empowers the judge by order to authorize the committee of the estate of the lunatic to do (amongst others) the following things: "(*l*) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic." Sect. 128 confers a similar power on the judge "where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power." If the application before the Court is to be granted, the jurisdiction must be derived from one or other or both of these sections. In each section the power spoken of is one vested in the lunatic, and neither section confers on the Court any authority with respect

C. A. 1906

S. S. B. (A Person of Unsound Mind not so found by Inquisition), *In re*.

Stirling L.J.

to powers which by statute are vested, not in the lunatic, but in his committee. In my judgment, therefore, the judge in lunacy has no jurisdiction under s. 116, sub-s. 2, to order that a power which would by statute be vested in the committee of a lunatic (if there were a committee) shall be exercised by the receiver of the estate of a person of unsound mind. For the reasons already given I think that the power conferred by s. 7 of the Lands Clauses Consolidation Act, 1845, is not conferred on a person under disability; and in the absence of authority I should be of opinion that there is no jurisdiction to make the order asked for.

The cases of *In re Baggs* (1), *In re X.* (2), and *In re Salt* (3) were referred to. None of them governs the precise case before us, and the reasons given for the decisions do not seem to be altogether in accordance; but it is plain that the very eminent judges who decided the two later cases did not intend to depart from or overrule the first. In these circumstances I cannot say that these cases afford very clear guidance for the decision of the present case; but *In re Baggs* (1), although decided with reference to another statute, the Settled Land Act, 1882, is (unless overruled) an authority against the applicants; and I am not prepared to overrule it. I think, therefore, that the application must be refused.

Cozens-Hardy L.J. read the following judgment:—The question on this appeal is whether it is competent to authorize the receiver or quasi-committee of a person of unsound mind not so found, who is tenant for life of a settled estate, to sell a portion of the property to a railway company under the provisions of the Lands Clauses Consolidation Act, 1845. This depends upon the true construction of s. 116 of the Lunacy Act, 1890, taken together with s. 120 and s. 128. There is no decision under the Lands Clauses Act, but there is a decision—*In re Baggs* (1)—that the similar power conferred by the Settled Land Act, 1882, cannot be exercised by a quasi-committee, and, if that decision is sound, I think it must govern the present case.

(1) [1894] 2 Ch. 416, n. (2) [1894] 2 Ch. 415.
(3) [1896] 1 Ch. 117.

C. A.
1906
S. S. B
(A Person of Unsound Mind not so found by Inquisition), *In re*.
Cozens-Hardy L.J.

The Settled Land Act, 1882, gives a power of sale (s. 3) and a power of leasing (s. 6) to every tenant for life: see the definition of tenant for life, s. 2, sub-s. 5. If the tenant for life is an infant, the powers of a tenant for life may be exercised on his behalf in the manner prescribed in s. 60. If the tenant for life is a lunatic so found by inquisition, the committee may in his name and on his behalf exercise the powers of a tenant for life under the Act (s. 62). There is no provision in the Act dealing with the case of a tenant for life who is of unsound mind but not so found, and no provision is made for the exercise of the powers which are conferred upon him. And in 1882 there was no machinery available for the purpose. There are no negative words in s. 62. That section did not create the powers. It only prescribed in a particular case how the powers of a tenant for life who is a lunatic so found are to be exercised.

Then we come to the Lunacy Act, 1890. Sect. 116, sub-s. 2, enables the judge in lunacy to order "such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge" to be exercised by the receiver. Sect. 120 is the material section. The judge may by order authorize and direct the committee of the estate of a lunatic to do all or any of the following things. Clause (*a*) does not help. It deals only with sale of property belonging to the lunatic, and not with sale of property of which he is only tenant for life. By clause (*h*) the judge may authorize the committee to "execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends." This exactly meets the case of s. 6 of the Settled Land Act, 1882; and *In re Salt* (1) rightly decided that by the combined operation of s. 116 and s. 120 (*h*) the receiver might be authorized to execute a power of leasing, whether a statutory power or a power conferred by the express terms of the deed or will creating the settlement. But clause (*h*) is limited to a power of leasing, and it seems to furnish a powerful argument against the contention that s. 120 applies to all powers under the Settled Land Act. It is a plain case for the application of the "expressio unius" doctrine. Clause (*l*) cannot apply, for a power of sale given to a tenant for life is not

(1) [1896] 1 Ch. 117.

C. A. 1906 — S. S. B. (A Person of Unsound Mind not so found by Inquisition), *In re*. — Cozens-Hardy L.J.

a power "vested in the lunatic for his own benefit": see the observations of Rigby L.J. in *In re Salt.* (1) Those words are addressed to common and well-known powers, such as the general power frequently given to or reserved by a tenant in tail on a resettlement which enables him to override all the limitations of the resettlement. I am therefore unable to find anything in s. 120 which enables a committee of a lunatic tenant for life to exercise the power of sale conferred on the lunatic by the Settled Land Act, 1882. It is true that under s. 62 of the Settled Land Act, 1882, he can sell, but that is not one of "the powers of this Act," that is, the Lunacy Act, 1890, made exercisable by the committee.

But then it is said that a power of sale given to a tenant for life is a power vested in a lunatic "in the character of trustee," and that s. 128 applies. I cannot accept this view. It is expressly repudiated by Lindley L.J. in *In re Baggs* (2), and by Rigby L.J. in *In re Salt.* (1) The result is that in my opinion the decision in *In re Baggs* (2) was sound, and ought to be followed.

A difficulty has, however, arisen by reason of the subsequent decision in *In re X.* (3) In that case it was suggested that the decision in *In re Baggs* (2) depended upon the language used in s. 62 of the Settled Land Act, 1882; but, with the utmost respect, I am unable to follow this suggestion. It is inconsistent with the whole judgment of Lindley L.J. The decision of the Court in *In re X.* (3) cannot, in my opinion, be reconciled with the decision in *In re Baggs.* (2) I can see no ground for holding that a power of sale conferred upon a lunatic tenant for life by the settlement differs in any material respect from a similar power of sale conferred upon him by the Settled Land Act. In neither case is it one of "the powers of this Act." There are many powers which cannot fairly be brought within the language of either s. 120 or s. 128—e.g., a power to jointure, a power to raise portions, and the various powers other than leasing powers conferred by the Settled Land Act upon limited owners. This distinction was recognized by the Court of Appeal

(1) [1896] 1 Ch. 117, 121. (2) [1894] 2 Ch. 416, n.
(3) [1894] 2 Ch. 415.

in *In re Earl of Sefton*. (1) It is, therefore, necessary to choose which of these two authorities is to be accepted, and I feel bound to say that I think *In re Baggs* (2) is the better decision and the one that ought to be followed. I am aware that the more convenient view would be to support *In re X*. (3) But our function is limited to interpretation, as distinct from legislation. It will be for Parliament to enact, if it thinks fit, that every power, whether conferred by statute or not, which might be exercised by a lunatic if of sound mind may be exercised, with the authority of the judge in lunacy, by a committee, and also by a quasi-committee. I can find nothing in the present statutes to this effect. The result is that, in my opinion, the Master was right in holding that there is no jurisdiction to authorize the quasi-committee to sell under the Lands Clauses Act.

FLETCHER MOULTON L.J. read the following judgment:—The point raised in this case is very easily stated. We have to decide whether the receiver, or, as he may be termed, the quasi-committee, of a person of unsound mind not so found by inquisition can sell settled lands, of which the lunatic is the life tenant, to a railway company, which has compulsory powers of purchase of such lands under the provisions of its special Act, which incorporates in the ordinary way the necessary provisions of the Lands Clauses Consolidation Act, 1845, relating to such purchases.

A life tenant, if under no disability by reason of being of unsound mind, has a power of selling the settled land by virtue of two statutes—namely, (1.) he has a general power of selling such lands under s. 3 of the Settled Land Act, 1882; and (2.) he has the special power of selling such lands to parties authorized to take them by a special Act which incorporates the provisions of the Lands Clauses Consolidation Act, 1845, with respect to the purchase of land by agreement. This special power of sale is given by s. 7 of that Act.

In the case of a lunatic so found by inquisition no difficulty arises. Sect. 62 of the Settled Land Act enables his committee

(1) [1898] 2 Ch. 378. (2) [1894] 2 Ch. 416, n.
(3) [1894] 2 Ch. 415.

C. A.
1906
S. S. B. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.*
Fletcher Moulton L.J

to exercise on his behalf the power conferred by that Act, and s. 7 of the Lands Clauses Consolidation Act, 1845, appears to me on its true construction to give the power of sale directly to the committee without even going through the process of conferring it in the first place on the lunatic, and then empowering the committee to exercise it on his behalf. But both these statutes are of earlier date than the Lunacy Act, 1890, and they make no reference to the quasi-committees of persons of unsound mind not so found by inquisition. It is, therefore, to the provisions of this last-mentioned Act that we must look for any authorization for the exercise of either of these powers of sale by quasi-committees.

These quasi-committees are appointed under the provisions of s. 116 of the Lunacy Act, 1890, which, after enumerating various classes of persons of unsound mind not so found by inquisition, provides with regard to them by sub-s. 2 that "such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner and with or without security as the judge may direct."

We have therefore to ascertain what powers of that Act are made exercisable by the committee of the estate of a lunatic. These powers are set out in ss. 120 and 128. The latter concerns only those cases in which a power is vested in a lunatic in the character of a trustee or guardian, or in which his consent is necessary in a like character. The section which deals directly with dealings with property that belongs to him, or in which he is interested, is s. 120. The case of sale is dealt with first. Sub-s. (*a*) empowers the committee to "sell any property belonging to the lunatic." These words are obviously too narrow to include land of which he is only the life tenant. Is the omission intentional and effective, or can we supply the missing powers from some of the other sub-sections?

That the omission was intentional can hardly, I think, be doubted. The power of sale by a life tenant under s. 3 of the Settled Land Act, 1882, was so well known, and so constantly put into operation, that it is impossible that the omission of words which would include it (such, for instance, as "or in which he is interested," or "of which he has the power of sale")

could be per incuriam. Moreover, an examination of the subsequent sub-sections of s. 120 shews that the draughtsman had s. 3 of the Settled Land Act, 1882, before him, and that he expressly gave to the committee other of the powers given to the tenant for life by that section. Thus, sub-s. (*b*) of s. 120 of the Lunacy Act, 1890 is evidently taken from sub-ss. (iii.) and (iv.) of s. 3 of the Settled Land Act, 1882, the language being in its essentials identical. Here we find a power given to the committee extending not only to property "belonging to the lunatic," but also to property "in which he is interested." Sub-s. (ii.) of s. 3 of the Settled Land Act, 1882, however, which, like sub-s. (i.), relates to the power of sale (in this instance mainly to copyholds), has no corresponding sub-section in s. 120 of the Lunacy Act, 1890. Further, we find that by sub-s. (*h*) of the last-mentioned section the whole of the powers of leasing property, in which the lunatic has only a limited estate (i.e., powers such as are given by Part IV. of the Settled Land Act, 1882), are transferred to the committee.

There can hardly be a doubt, therefore, that in sub-s. (*a*) the Legislature intentionally restricted the empowerment of the committee in the case of sale to property belonging to the lunatic to the exclusion of property in which he had only an interest which gave him a power of sale. The next question is whether we can find in any of the other sub-sections something which supplies this omission.

It is suggested that the language of sub-s. (*l*) is broad enough to do this. If the sub-section stood alone, there would be much to say for this view. But we have to construe s. 120 as a whole, and it is difficult to accept a construction which would make sub-s. (*h*) absolutely and even formally superfluous, and would render inexplicable the insertion of the important words "or in which he is interested" in sub-s. (*b*), which place it in such marked contrast to sub-s. (*a*). Even without the authority of any decisions of this Court to guide me, I should have come to the conclusion that in its present collocation sub-s. (*l*) must receive a more limited construction, and that the powers therein referred to are of a different type from the powers over settled land given to the tenant for life by the Settled Land Act, 1882.

C. A. 1906

S. S. B. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.*

Fletcher Moulton L.J.

The other suggestion is that, so far as the property in the settled land is not in the lunatic, he is in the position of a trustee for those interested, and that therefore the committee has power to sell their interest under s. 128 of the Lunacy Act, 1890. This contention is sought to be supported by s. 53 of the Settled Land Act, 1882, which provides that, in relation to the exercise by him of any of the powers of that Act, the tenant for life shall be deemed to be in the position of a trustee for the other parties interested. The power of sale is therefore sought to be divided into two parts—namely, (1.) the power of selling his life interest, which is justified by s. 120 (*a*); and (2.) the power of sale of the remaining interests, which is sought to be justified by s. 128. It seems to me most improbable that, if the Legislature had intended to give to the committee this power of sale of property of which the lunatic is life tenant, it would have done so in a way so roundabout and unnatural, or that it would have spoken of the power of sale of the settled land as a power "vested in a lunatic in the character of trustee." These ingenious attempts to supply what is to my mind so clearly an intentional omission do not, in my opinion, accord with the canons of sound construction of statutes, and, even if I had no authority to guide me, I should accept the interpretation that I consider the more natural one, namely, that these sections of the Lunacy Act, 1890, do not give to the committee the power of selling settled land, which is vested in the lunatic by the Settled Land Act, 1882.

But there is express authority on the point. This Court in the case of *In re Baggs* (1) had before it the precise question which is raised in the present case, so far as it relates to the powers given by the Settled Land Act, 1882. All the arguments pressed upon us were there urged, but the Court unanimously came to the conclusion which, as I have said, appears to me to be the right one. That they did so is expressly recognized in the case of *In re Salt* (2), and Rigby L.J. there states that he would have considered himself bound by, and would have followed, the decision of the Court in *In re Baggs* (1), had the point in that case been the same. I agree with him in thinking that this Court would be so bound, so that the view which I hold to be correct as a matter of

(1) [1894] 2 Ch. 416, n. (2) [1896] 1 Ch. 117.

construction I also hold as having been decided to be the right view by a decision which is binding upon me.

The real difficulty in this case arises from the decision of this Court in the case of *In re X.* (1) There the Court—two members of which were parties to the judgment in *In re Baggs* (2)—had before them the case of a lunatic not so found by inquisition, who was the life tenant under a settlement which gave to him, as such life tenant, the power to sell the settled land with the written consent of the trustees. They held that this differed from the case of *In re Baggs* (2), and that the Lunacy Act, 1890, ss. 120 and 128, enabled the judge to permit the receiver to exercise the power of sale. I do not myself see the materiality of the distinction that the power of sale of the settled land was in that case vested in the lunatic by a settlement, whereas in *In re Baggs* (2) it was vested in the lunatic by s. 3 of the Settled Land Act, 1882; and, if that point were before us, it would, in my opinion, require careful consideration before we could come to the conclusion that the distinction was material. But it is clear that the Court thought it was so, and it was on this ground, and on this ground alone, that they decided the case. They shewed no intention to dissent from the decision in *In re Baggs* (2), but rather they shewed an intention to affirm it. This decision, therefore, does not justify us in departing from the clear and unmistakable principle laid down by the Court in that case. I may say that I cannot believe that the Court, in deciding *In re X.* (1), gave to s. 62 of the Settled Land Act, 1882, a prohibitive force, limiting the power to committees to the exclusion of quasi-committees, on the principle of "expressio unius exclusio alterius." This principle can only apply to matters as existing at the date when the "expressio" takes place, and at that date the office of quasi-committee did not exist.

So far I have dealt with the power of sale given by the Settled Land Act, 1882. The case of s. 7 of the Lands Clauses Consolidation Act, 1845, is still clearer. Even if we assume that the power of sale is vested by that section in the lunatic in the first instance and then transferred to the committee, the restriction of the power of sale under s. 120 to the case of property belonging

(1) [1894] 2 Ch. 415. (2) [1894] 2 Ch. 416, n.

C. A. 1906 S. S. B. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION), *In re.*

to the lunatic applies equally, and there is still less ground for arguing that the power, or any part of it, comes under s. 128.

I am of opinion, therefore, that the law, as it at present stands, does not authorize the judge to make an order that a quasi-committee shall sell lands of which the lunatic is life tenant.

Solicitors for applicants: *Parson, Lee & Co.*

E. L.

C. A. 1906 *March* 5,

In re R.

Lunacy—Vesting Order—Stock—Trust Fund—Trustee—Criminal Lunatic—Repealing Act—Saving Clause, Effect of—Jurisdiction, Reservation of—Lord Cairns' Act—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 5—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 136, 340, 342—*Form of Vesting Order.*

As the Lunacy Act, 1890, gives no jurisdiction to make a vesting order in the case of a trustee who is a criminal lunatic (see ss. 136 and 340), the old jurisdiction in such a case under s. 5 of the Trustee Act, 1850, is preserved by the proviso or saving clause in s. 342, notwithstanding that by that section s. 5 of the earlier Act is in terms repealed, there being nothing in the later Act inconsistent with the preservation of that jurisdiction; and the Court in lunacy will exercise that jurisdiction accordingly by making a vesting order under the Act of 1850.

Where an Act conferring a certain jurisdiction is repealed by a subsequent Act containing a saving clause to the effect that the repeal shall not affect any jurisdiction established under the repealed Act, the jurisdiction under the repealed Act should, in the absence of any inconsistency between the two Acts, be regarded as preserved by virtue of the saving clause.

The dictum of Baggallay L.J. in *Sayers* v. *Collyer*, (1884) 28 Ch. D. 103, 107, as to the preservation of the jurisdiction under Lord Cairns' Act by the saving clause in the repealing Act (the Statute Law Revision and Procedure Act, 1883), considered.

Form of vesting order of stock standing in the name of a criminal lunatic trustee.

UNDER a marriage settlement dated in 1868 a sum of India 3*l.* 10*s.* per Cent. Stock stood in the names of two trustees. In 1904 one of these trustees, R., was convicted of a criminal offence, but, being at the time of unsound mind, though not so found, he was ordered to be confined in a criminal lunatic asylum, where

he still was, and his estate was now being administered in lunacy.

In 1896, under a power in the settlement, a new trustee was by deed appointed in the place of the lunatic trustee, and it was thereby declared that the original and new trustee should hold the stock, when transferred into their names, upon the trusts of the settlement. In consequence of R.'s lunacy a summons in lunacy was taken out by the original trustee for an order vesting the stock in the names of himself and the new trustee. The summons was entitled in the matter of the settlement, and "In the matter of R., a person of unsound mind not so found by inquisition, and In the matter of the Lunacy Acts, 1890 and 1891." Upon the summons coming on in chambers before Cozens-Hardy L.J., as judge in lunacy, his Lordship directed it to be adjourned into Court for argument upon the question whether the Court had jurisdiction to make the order, R. being a criminal lunatic.

The doubt as to the jurisdiction arose in consequence of the following enactments:—

Under s. 5 of the Trustee Act, 1850 (13 & 14 Vict. c. 60), when any person was entitled "jointly with any lunatic or person of unsound mind"—which words included a criminal lunatic—to any stock, the Court had power to make a vesting order. That section was in substance re-enacted, as regards any trustee who is a "lunatic or person of unsound mind," by ss. 136 and 341 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5); but s. 340, sub-s. 1, of the latter Act enacts that, "Save as in this Act otherwise expressly provided this Act shall not extend to criminal lunatics." Then the Act concludes, by s. 342, as follows: "The Acts mentioned in the Fifth Schedule are hereby repealed to the extent set forth in the third column of the same schedule. Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or salary or compensation or superannuation secured, by or under any enactment repealed by this Act."

Among the enactments stated in the Fifth Schedule as repealed is the above-mentioned s. 5 of the Trustee Act, 1850.

The substantial question now raised was, whether, as the

C. A. 1906 R., *In re.*

Lunacy Act, 1890, contains no provision for making a vesting order in the case of a trustee who is a criminal lunatic, the old jurisdiction established under s. 5 of the Trustee Act, 1850, in such a case has been preserved by the saving clause in s. 342 of the Act of 1890.

The summons was served upon the new trustee and the receiver of R.'s estate, but neither appeared by counsel at the hearing.

The appeal was heard on March 5, 1906.

W. M. Cann, for the applicant. Prior to the Lunacy Act, 1890, coming into operation the Court had undoubtedly jurisdiction, under s. 5 of the Trustee Act, 1850, to make a vesting order in the case of a criminal lunatic trustee; and the question is whether that old jurisdiction is left untouched or is preserved by the later Act, which contains no express provision for such a case. I submit, first, that as the Act of 1890 does not extend to criminal lunatics (s. 340), the old jurisdiction over criminal lunatic trustees must be regarded as still existing; and, secondly, that upon the ordinary grammatical construction of the saving clause in s. 342, the old jurisdiction must be treated as expressly preserved. There is no actual decision upon the point now before the Court, but in analogous instances of repeals of Acts of Parliament the jurisdiction in certain cases under those Acts has been held to have been preserved by a saving clause in the repealing Act. For example, in *Sayers* v. *Collyer* (1) it was said by Baggallay L.J. that the jurisdiction of the Court under Lord Cairns' Act to give damages as alternative relief to an injunction was, notwithstanding the repeal of that Act, preserved by the saving clause (s. 5) of the Statute Law Revision and Procedure Act, 1883. It may be said that that is only a dictum, but, in the absence of any direct authority, I would rely on that statement of opinion by that learned judge as supporting my present argument. Moreover, that case has since been referred to as being an authority that the jurisdiction under Lord Cairns' Act is still subsisting: *Greenwood* v. *Hornsey* (2); *Chapman, Morsons & Co.* v. *Auckland Union* (3); *Shelfer* v. *City of London*

(1) 28 Ch. D. 103, 107. (2) (1886) 33 Ch. D. 471, 476.
(3) (1889) 23 Q. B. D. 294, 299, 301.

Electric Lighting Co. (1) Similarly, in other cases the jurisdiction under a repealed Act has been held to have been preserved by a saving clause in the repealing Act; for the true principle seems to be that where there is such a saving clause the jurisdiction under the repealed Act is preserved unless the repealing Act contains something absolutely inconsistent with the continuance of that jurisdiction: *In re Busfield* (2); *Winfield* v. *Boothroyd* (3); *Hume* v. *Somerton* (4); *The James Westoll.* (5) The effect of this saving clause in s. 342 as to the preservation of the jurisdiction conferred by the repealed Lunacy Act, 1889, was explained in Parliament.

[COLLINS M.R. I doubt whether we are entitled to refer to what took place in Parliament.]

The statements to which I refer are important, because they were statements carefully prepared by the Lord Chancellor and the Attorney-General in answer to questions as to how far previous jurisdiction had been preserved by the saving clause in s. 342. In Hansard, 3rd series, vol. 344, col. 417, the Lord Chancellor is reported to have replied as follows to a question put by Lord Barrington: "The justices appointed under the Lunacy Act, 1889, have jurisdiction to make orders under the Lunacy Act, 1890. The jurisdiction established under the Act of 1889 was expressly preserved by s. 342 of the Consolidation Act. The justices are, therefore, precisely in the same position with regard to their jurisdiction. I am glad the noble Lord has asked the question, because I understand that some doubts have been raised, and I think it very important that it should be clearly understood that they have the same jurisdiction under the existing Act as they had under the statute by which they were appointed"; and in col. 458 the Attorney-General is reported to have replied in almost the same words to a question put to him in the House of Commons. The point was an important one, because it affected the liberty of the subject, the justices having had power, under the repealed Act of 1889, of making reception orders: see Justice of the Peace, vol. 54, p. 606.

(1) [1895] 1 Ch. 287, 310, 315. (3) (1886) 54 L. T. 574; 34 W. R. 501.
(2) (1886) 32 Ch. D. 123, 131-2. (4) (1890) 25 Q. B. D. 239, 241.
(5) [1905] P. 47.

C. A. 1906 R., *In re.*

[Cozens-Hardy L.J. Have you considered whether there is any difficulty now in making a vesting order in such a case as this in the Chancery Division?]

The High Court has jurisdiction under the Trustee Act, 1893, to appoint a new trustee in the place of a sole surviving trustee who is a lunatic not so found, but has not the power to make a vesting order; for that purpose an application must be made in lunacy, not in Chancery: *In re M.* (1) I submit that, notwithstanding the repeal of s. 5 of the Trustee Act, 1850, by s. 342 of the Lunacy Act, 1890, the saving clause in that section applies to this case. Since the Act does not deal with criminal lunatics at all, it cannot affect an Act which does deal with them. There is no reason why the words of the clause should not be given their ordinary grammatical construction.

Collins M.R. The question in this case arises upon the application by one of two trustees, who is himself sane, to have the funds which are at present vested in him and his co-trustee, who is a criminal lunatic, transferred to himself and a new trustee; and the question is whether, under the present condition of the law, there is jurisdiction to make that order. Before the passing of the Lunacy Act, 1890, a matter of this kind was provided for by s. 5 of the Trustee Act, 1850, which deals with the question of the transfer of stock from one trustee to another in cases of lunacy without expressly making any distinction between a criminal lunatic and any other class of lunatic. Therefore, such a matter as the present could formerly have been dealt with under that section. But the difficulty here arises by reason of the repeal of that section by the Act of 1890. Now the repealing section (s. 342) commences thus: "The Acts mentioned in the Fifth Schedule are hereby repealed to the extent set forth in the third column of the same schedule." Then in Sched. V. of the Act, among the sections repealed is s. 5 of the Act of 1850. So that, thus far, we find that the statutory provision which previously covered criminal lunatics is repealed. Then comes the clause which gives rise to the present difficulty, namely, the proviso in s. 342, and the question is

(1) [1899] 1 Ch. 79.

whether that proviso preserves the jurisdiction over criminal lunatics conferred by s. 5 of the Act of 1850. The proviso is in these words: "Provided that this repeal shall not affect any jurisdiction or practice established, confirmed, or transferred, or salary or compensation or superannuation secured, by or under any enactment repealed by this Act." Now, there has been no reported decision upon these particular clauses of this Act, and therefore Mr. Cann has assisted us by reference to cases having some analogy to the present. In the absence of any authorities having a direct bearing upon this Act, he has suggested that in other instances in which Acts of Parliament have been repealed, such as Lord Cairns' Act, the old jurisdiction has been preserved by a saving clause in the repealing Act. Now, no doubt there are existing decisions which have treated the jurisdiction under Lord Cairns' Act as remaining in force, notwithstanding its repeal, for by some accident the repealing Act contains a saving clause; and in *Sayers* v. *Collyer* (1) Baggallay L.J. made the following observations with reference to Lord Cairns' Act and the saving clause in the repealing Act: "Our attention was called to the fact that Lord Cairns' Act had been repealed since the former hearing of this case, being included in the schedules to the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but that Act contains words preserving the jurisdiction of the Court notwithstanding the repeal. By s. 5 it is enacted that any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the Act shall not be affected by the repeal. It is not, however, necessary to have recourse to Lord Cairns' Act, for it is clear that the Court now has power to give damages as alternative relief. Before Lord Cairns' Act was passed a plaintiff who wished to enforce a restrictive covenant had two remedies; he might come into a Court of Equity for an injunction to restrain an infringement of his right, or he might have recourse to a Court of Common Law to obtain damages, and Lord Cairns' Act gives the Courts of Equity the power of giving a plaintiff damages by way of alternative relief. But since the Judicature Acts each

(1) 28 Ch. D. 103, 107.

C. A. 1906 R. *In re.* Collins M.R.

Division of the Court has full power, apart from Lord Cairns' Act, to give either an injunction or damages." Whether that is a correct view or not of the law for the reasons given by the Lord Justice, it cannot be regarded as an actual decision in point; but nevertheless it is an expression of opinion by a very learned judge that a particular saving clause which does not appear to differ in any material respect from the saving clause in s. 342 of the Act now before us has the effect of keeping alive the jurisdiction under Lord Cairns' Act. A number of other cases to which Mr. Cann has referred certainly assume that the jurisdiction under Lord Cairns' Act has been preserved.

There were one or two other cases cited which have an important application to the present case, that is to say, cases where you find in an Act a repealing clause followed by a saving clause. There you have to see how far the two enactments can co-exist. It seems to me that the principle laid down in those cases is applicable to the present case. And that principle is this: Where you have a repeal and you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment. The question is, Aye or No, is there incompatibility between the two? And in those cases the judges, in holding that there was a saving clause large enough to annul the repeal, said that you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; and that, if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as pro tanto wiped out. That is settled by the cases of *In re Busfield* (1) and *Hume* v. *Somerton*. (2) In both those cases the judges relied upon the incompatibility of the substituted enactments with the old enactments, and held that in consequence of that incompatibility the jurisdiction under the old Act could not remain; but they were prepared to hold that the saving clause would, if there were no incompatibility between the enactments, have the effect of annulling the repeal.

In this state of the authorities it appears to me that there is

(1) 32 Ch. D. 123. (2) 25 Q. B. D. 239.

enough here to enable us to hold that under this saving clause the useful jurisdiction under the Act of 1850 in the case of criminal lunatics has not been absolutely wiped out. It would be a public misfortune if there were no jurisdiction over funds held by criminal lunatics, and, in my opinion, we are not bound to hold that in consequence of the Act of 1890 no such jurisdiction now exists. On the contrary, it seems to me to have been the intention of this saving clause to preserve that jurisdiction. Accordingly, I am of opinion that the jurisdiction under the old Act remains, though the practice must be governed by the new Act.

Romer L.J. I am of the same opinion. No doubt there is a difficulty with regard to criminal lunatics owing to the repeal by s. 342 of the Lunacy Act, 1890, of s. 5 of the Trustee Act, 1850. The position is this: Prior to the Act of 1890, there was undoubted jurisdiction on the part of the Lords Justices, in a case like the present, to make a vesting order even in the case of a criminal lunatic. Turning to the Act of 1890, it appears that the section which deals with the general jurisdiction of the Court to make vesting orders (s. 136) does not cover the case of a criminal lunatic, owing to s. 340, which enacts that "save as in this Act otherwise expressly provided this Act shall not extend to criminal lunatics." Now, the old jurisdiction conferred by the prior Act was first of all swept away by the repealing section (s. 342) of the Act of 1890, but this repealing section contains a specific provision that the repeal "shall not affect any jurisdiction, or practice established, confirmed, or transferred . . . . by or under any enactment repealed by this Act." I agree that these general words at the end of the section must have some limitation; and I think the limitation is this, that you cannot set up by this provision anything that is inconsistent with the provisions of the Act of 1890. But, subject to that, I think that the plain words of s. 342 must be given effect to. Therefore, I look at the Act of 1890 to see whether it contains anything which shews that the jurisdiction of the Court with respect to criminal lunatics is no longer to be exercised. Now, I do not find that. There is power, no doubt, given by the Act

C. A. 1906 R., *In re.* Romer L.J.

of 1890 to make vesting orders of a general character; but the mere fact that s. 340 says that the Act shall not extend to criminal lunatics does not, of itself, sufficiently shew that it was the intention of the Legislature that this Court should never exercise the jurisdiction it previously had as regards criminal lunatics. Let us test it in this way: Supposing there had been no repeal by s. 342, does what is contained in the Act of 1890 amount to a repeal of the powers of the Court under the old Act? In my opinion, certainly not. That being so, it appears to me that the old jurisdiction, so far as it concerns criminal lunatics, still exists. In my opinion the present case is exactly the kind of case the Legislature was aiming at when it put in the proviso in s. 342. In my judgment, therefore, the order asked for can be made and should be made.

Cozens-Hardy L.J. I am very glad that the Master of the Rolls and Romer L.J. can see their way to a decision which is highly convenient. I in nowise dissent from that decision, although this is, in my opinion, an extremely difficult case. I am pressed rather with the view that this decision will tend to make the work of statute law revision a matter of great difficulty, because it will be so difficult to say whether the time has arrived at which the powers contained in the repealed Acts put into the schedule of any particular Revision Act have come to an end, for it may be that in some case like the present a state of circumstances may arise in which it may be doubtful whether the jurisdiction under one or other of the repealed Acts is still existing, But here the language of the saving clause in s. 342 is undoubtedly very strong. It contains words enabling us to make such an order as is now asked for, and to hold that, so far as criminal lunatics are concerned, there being no provision in the Act of 1890 to meet such a case as the present, we have to go back to the Act of 1850. There appears to be no direct decision upon the point, and probably this is the first case of the kind which has happened. The actual form of the order requires consideration, and I shall be happy to assist Mr. Cann in putting the order into the proper form. It appears to me that the order should be entitled "In the matter of R., a criminal lunatic, and

a person of unsound mind," &c., and also "In the matter of the Trustee Act, 1850," as well as "In the matter of the Lunacy Acts, 1890 and 1891."

I wish to say one word as to Lord Cairns' Act. As I follow Mr. Cann's able argument, to which, personally, I feel indebted, there is no express decision that that Act is still in force, though in some cases it seems to have been so treated. But I think the better view is expressed by Lord Esher in *Chapman, Morsons & Co.* v. *Auckland Union* (1), where he says: "It is true that Lord Cairns' Act has been repealed since the passing of the Judicature Acts by 46 & 47 Vict. c. 49, s. 3, but I am confident that the repeal was not with the intention of taking away any of the powers given by the Act in a Chancery action, but because it was considered that the Judicature Acts re-enacted those powers, and therefore that Lord Cairns' Act had become obsolete, and might be repealed."

That passage is, however, not really necessary for the decision of this case.

Upon the whole I think the order in the present case may go. The summons should be amended so as to agree with the form of order I have indicated, and leave is given accordingly.

The minutes of order were settled by Cozens-Hardy L.J. in the following form:—

"In the matter of the trusts of an indenture of settlement," &c.: "And in the matter of R., a criminal lunatic, and a person of unsound mind not so found by inquisition: And in the matter of the Trustee Act, 1850: And in the matter of the Lunacy Acts, 1890 and 1891.

"Upon the application of (the sane trustee), and upon hearing counsel for the applicant, and for the respondents (the new trustee), and the above-named R. by —— the person appointed by an order dated," &c., "and made in the secondly-mentioned matter to exercise such of the powers of a committee of his estate as thereby directed: And upon reading," &c.: "And it appearing that the said R. is a criminal lunatic and is a lunatic or person of unsound mind within the meaning of the Trustee Act, 1850, and is possessed of the property hereinafter mentioned, and now remaining subject to the trusts of the said indenture of settlement, as trustee within the meaning of the Trustee Act, 1850, jointly with the said (sane trustee), and that the said

(1) 23 Q. B. D. 294, 299.

C. A. 1906 R., *In re.*

(sane trustee) and (new trustee) are the present trustees of the said indenture of settlement: We do order (1.) That the right to call for a transfer of, and to transfer into their own names the sum of ——*l.*, India 3*l.* 10*s.* per Cent. Stock standing in the books of the Governors and Company of the Bank of England in the names of the said (sane trustee) and R. by their descriptions of," &c., "and to receive the dividends due, and to accrue due thereon, do vest in the said (sane trustee) and (new trustee), and that they do transfer the same into their joint names accordingly, to be held by them upon the subsisting trusts of the said indenture of settlement; (2.) That the costs of the applicant and of the respondents of and incident to obtaining this order and carrying the same into effect be taxed, and, when certified, be paid by the trustees out of the trust estate."

Solicitor: *F. Tiernay.*

G. I. F. C.

C. A. 1906 *March* 26.

BONNARD *v.* DOTT.

[1904 B. 4633.]

Money-lender—Registration—Contract of Unregistered Money-lender—Validity —Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-ss.* 1 (*a*) (*c*), 2.

Sect. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900, applies to a money-lender who has not registered himself as such under the regulations of the Act, and prohibits him from making any agreement with respect to the advance and repayment of money, and from taking any security for money, in the course of his business as a money-lender. Consequently any such agreement is illegal and void, and, the statutory prohibition being intended for the protection of the borrower, the borrower under any such agreement may recover any securities which he has given to the money-lender, although the money-lender cannot recover the money which he has advanced.

Victorian Daylesford Syndicate, Ld. v. *Dott*, [1905] 2 Ch. 624, followed and approved.

APPEAL from a decision of Kekewich J.

The action was brought for relief under the Money-lenders Act, 1900, in respect of certain money-lending transactions entered into between the plaintiff and defendant, on the ground that the transactions in question were harsh and unconscionable.

The plaintiff was a company promoter, and was, at the date of this action, an undischarged bankrupt. In 1903 the plaintiff borrowed 50*l.* from the defendant, and he subsequently borrowed

from him further sums of money, the total sums so borrowed amounting to 940*l*. In respect of these loans the plaintiff gave to the defendant promissory notes and bills of exchange, which were renewed from time to time, and ultimately, on June 16, 1904, the plaintiff gave to the defendant two promissory notes for 840*l*. and 200*l*. at two months, the additional 100*l*. representing a cash bonus to the defendant. The plaintiff also gave to the defendant, by way of bonus or consideration for these loans and renewals, 1100 shares in the Manica Copper Company, Limited, and 3700 shares in the Daylesford Gold Mine, Limited, and an undertaking to deliver him 4800 shares in the Victorian Cornish Gold Mines, Limited. At the date of the trial the total value of these shares amounted approximately to 5000*l*.

The plaintiff claimed that these transactions might be reopened and that he might be relieved from payment of any sum in excess of that adjudged by the Court to be fairly due from him to the defendant for principal, interest, and costs; and he also claimed an order for the return of the above shares and the undertaking to deliver up on his submitting to pay what should be adjudged to be fairly due from him to the defendant. The defendant, who was not registered as a money-lender, denied that he was a money-lender within the meaning of the Act of 1900, or that the transactions in question were harsh and unconscionable; and he counter-claimed for specific performance of the plaintiff's undertaking to deliver the shares in the Victorian Cornish Gold Mines, Limited, and, in the alternative, for damages for non-delivery of the shares. The plaintiff, in reply, pleaded that, inasmuch as the defendant was an unregistered money-lender, the money-lending transactions were illegal and void, and that the defendant ought to be ordered to retransfer to the plaintiff all the securities in his hands. The plaintiff, however, though relying on the ground of the defendant's incapacity to enforce the transactions as a defence to the counter-claim, was willing to pay to the defendant the amount of the principal, together with such interest as the Court should deem reasonable in the circumstances.

The action came on for trial in April, 1905. On April 15

C. A. 1906 BONNARD v. DOTT.

Kekewich J. decided that the defendant was a money-lender within the meaning of the Act of 1900, but reserved judgment on the rest of the case. On May 10 the learned judge delivered judgment upon the question whether the circumstances attending the bargain or series of bargains between the parties were such as to justify the Court in reopening the transactions. Upon a full consideration of all the circumstances his Lordship came to the conclusion that the transactions were harsh and unconscionable, and ought to be reopened upon the terms of the plaintiff's paying to the defendant the sum of 1040*l.* or so much thereof as still remained unpaid, with interest thereon at 20 per cent.; and upon payment of that amount by the plaintiff he ordered that the shares in the Manica Company and in the Daylesford Gold Mine should be transferred by the defendant to the plaintiff; and he dismissed the counter-claim and ordered the defendant to pay the costs of the action and counter-claim. His Lordship, however, having held that the counter-claim failed, thought it better to avoid expressing any opinion on the question whether, inasmuch as the defendant was a money-lender within the meaning of the Act of 1900 and had not complied with the provisions of the Act respecting registration, he was competent to sue for debts incurred in money-lending transactions. The defendant appealed.

Foote, K.C., and *Rayner Goddard*, for the defendant, after arguing, on the authority of *Carringtons, Ld.* v. *Smith* (1), that the contract was not harsh and unconscionable within s. 1 of the Money-lenders' Act, 1900, continued as follows: A further question was raised by the plaintiff, whether the failure of the defendant to register himself as a money-lender under s. 2 of the Act (2)

(1) [1906] 1 K. B. 79.

(2) The material provisions of the Money-lenders Act, 1900, are as follows:—

Sect. 2, sub-s. 1: "A money-lender as defined by this Act—

"(*a*) Shall register himself as a money-lender in accordance with the regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

"(*b*) Shall carry on the money-lending business in his registered name, and in no other name and under no

did not prevent him from recovering on his counter-claim, and that view is supported by the decision of Buckley J. in *Victorian Daylesford Syndicate, Ld.* v. *Dott.* (1) It is submitted that that decision is wrong and ought to be overruled. By clause (*a*) of sub-s. 1 of s. 2, a money-lender is bound to register himself in accordance with the regulations under the Act, and if he fails to do so he is liable to prosecution; but clauses (*b*) and (*c*), which provide that a money-lender shall not carry on any money-lending business or enter into any money-lending contract otherwise than in his registered name, apply only to registered money-lenders.

[COZENS-HARDY L.J. The result of that would be that no money-lender would register.]

That is expressly provided for by sub-s. 2, which subjects a money-lender who fails to register to very heavy penalties; but the Act contains no specific provision preventing an unregistered money-lender from suing on his contract, and it is submitted that that was not the intention of the Legislature. Upon the construction put upon the Act by Buckley J. the provisions in s. 1 as to reopening transactions cannot apply at all to an unregistered money-lender, because the contract would be absolutely void; but the section is expressed to apply to any money-lender, and the definition of "money-lender" in s. 6 is not confined to registered money-lenders. Further, s. 2 is a penal section, and ought to be construed strictly. It creates four separate offences for which the money-lender may be prosecuted under sub-s. 2, but in the

---

other description, and at his registered address or addresses, and at no other address; and

"(*c*) Shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name. . . . ."

(Sub-s. 2 provides that a money-lender who fails to comply with these provisions is liable to fine and imprisonment, and sub-s. 3 provides that a prosecution under sub-s. 1 (*a*) shall not be instituted except with the consent of the Attorney-General.)

Sect. 6: "The expression 'money-lender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business" [subject to certain exceptions not material to the present case].

(1) [1905] 2 Ch. 624.

C. A. 1906 BONNARD v. DOTT.

case of the first offence—the offence of not registering—the fiat of the Attorney-General is required as a condition precedent to the prosecution (sub-s. 3). That is really a provision for the benefit of the lender, and was introduced owing to the difficulty of ascertaining when a man becomes a money-lender under the Act and to the liability of the supposed money-lender to oppression by the borrower.

P. O. Lawrence, K.C. (*Gore-Browne, K.C.*, and *Vernon* with him), for the plaintiff. The Legislature, by s. 2, sub-s. 1 (*c*), has plainly prohibited any unregistered money-lender from entering into any money-lending contract. The consequence of that is that the transaction is wholly void, and no property passes thereunder: *Fergusson* v. *Norman* (1); *Bensley* v. *Bignold.* (2) As a general rule neither party to an illegal contract can recover back anything which he has parted with in pursuance of such contract: *Collins* v. *Blantern.* (3) But that rule is subject to an exception where the statute prohibiting the contract intended to protect a particular class and the person seeking to recover is a member of the protected class: *Kearley* v. *Thomson.* (4) This prohibition was obviously intended for the protection of the borrower, and it follows that the borrower in this case is not debarred from recovering the shares which he gave to the lender by way of bonus, whereas the lender cannot recover the money which he has advanced. The plaintiff, however, is not appealing from the judgment of Kekewich J., and is willing to abide by the terms of that judgment.

Rayner Goddard, in reply.

COLLINS M.R. This is an appeal from a decision of Kekewich J. in a money-lending case, in which the borrower sought to reopen the transaction with the lender as coming within the Money-lenders Act, 1900. Kekewich J., in going into the whole question, first decided the issue that the defendant was a money-lender, and then proceeded to grant relief under s. 1, on the ground that the transaction was "harsh and unconscionable." The defendant

(1) (1838) 5 Bing. N.C. 76.
(2) (1822) 5 B. & Ald. 335.
(3) (1767) 2 Wils. 341; 1 Sm. L. C. 11th ed. p. 369.
(4) (1890) 24 Q. B. D. 742.

put in a counter-claim, and on that counter-claim the question of the defendant's own position came up for discussion, viz., whether he was or was not a person entitled to put in a counter-claim at all. It now appears that he was not in a position to enforce his counter-claim by reason of his not having registered himself as a money-lender under the provisions of the Act. That fact having come out at the trial, in my opinion it is open to the respondent to support the judgment of Kekewich J., on the ground of the defendant's incapacity to enter into the transaction at all, as well as on the ground on which Kekewich J. proceeded, subject to the burden on the respondent of submitting to the terms imposed upon him by that judgment as the condition of obtaining relief, there having been no cross appeal by the respondent. Therefore, I think that we are justified in considering this case in one aspect only and in confining ourselves to the question of the defendant's incapacity. If the respondent were not barred by his failure to appeal the position would be this: That the defendant is a person who is declared by the Court to be a money-lender, and who by his omission to register himself finds himself under a statutory incapacity to enforce the bargain which he has made. The consequence of that is that whether it is the borrower or the lender who brings the matter before the Court, the transaction is absolutely void. The lender cannot compel the borrower to return the money lent, while the borrower, being one of the class which the Act was presumably designed to protect—see *Kearley* v. *Thomson* (1)—can compel the lender to return the securities for the loan, at any rate on the terms of repaying the amount lent. The borrower, however, has taken the course of impeaching the transaction only on the grounds set out in s. 1 of the Act. In the circumstances the Court thought that interest at the rate of 20 per cent. was reasonable to be allowed as the condition on which the transaction should be re-opened, and the respondent accepted the obligation of paying back the principal with interest at that rate. It is unnecessary for us to express any opinion on the question whether the conduct of the money-lender was such as to let in the right to relief under s. 1. If it turns out that the money-lender was not in a position to act

(1) 24 Q. B. D. 742.

C. A. 1906 BONNARD v. DOTT. Collins M.R

on this contract at all, that disposes of the whole case, and that turns upon the provisions of sub-s. 1 of s. 2 of the Money-lenders Act, 1900, dealt with by Buckley J. in a case against the same defendant—*Victorian Daylesford Syndicate, Ld.* v. *Dott.* (1) The learned judge there had to consider what was the position of a money-lender who had failed to comply with the provision in that sub-section as to registration, and who had entered into a money-lending contract. [His Lordship read clauses (*a*), (*b*), (*c*) and (*d*) of sub-s. 1 of s. 2, and continued:—] The learned judge having those clauses before him, came to the clear conclusion that the transaction was illegal. The only contention raised by the appellant against that view was that the preliminary words of the sub-section, "A money-lender as defined by this Act," as applied to clauses (*b*), (*c*) and (*d*), could not be taken to embrace anyone except a registered money-lender. I have a difficulty in following that argument. It seems to me that the sub-section means this, that any person who is in fact a money-lender must comply with the terms of the Act as to registration in order to take advantage of any contract. It is said that a man may not know whether he is a money-lender or not. In that case he will, if he is well advised, register himself as a money-lender under the Act. But if he chooses not to register he must take the risk of any inconvenience to himself which may ultimately be found to arise by reason of his failure to comply with the provisions of the Act. I agree entirely with Buckley J's decision, and I think that this appeal fails.

ROMER L.J. I am of the same opinion. I agree with the decision of Buckley J. in *Victorian Daylesford Syndicate, Ld.* v. *Dott* (1) with respect to the true construction of s. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900, as applied to the circumstances of a case like the present. I am satisfied with that decision for the reasons given by the learned judge in his judgment, and I do not desire to add anything to what he said. It follows that in the present case the contract entered into between the parties was void so far as concerned the money-lender. He obtained no rights whatever under this contract, and not only could he not

(1) [1905] 2 Ch. 624.

maintain his counter-claim but the plaintiff could, if he had chosen, have asserted a right to relief against him even beyond that given to him by Kekewich J. in his judgment. In my opinion it is clearly open to the plaintiff on the present occasion to take the point that the appeal must fail on the ground with which I am now dealing, although the learned judge decided the case upon another ground, and I think that it is fatal to the appeal. The appeal fails on this short ground, and it is therefore unnecessary to go into the other points which have been raised.

COZENS-HARDY L.J. I agree, and have nothing to add. (1)

Solicitors: *Morton & Patterson; John Vernon, Son & Stephen.*

H. B. H.

BISGOOD *v.* NILE VALLEY COMPANY, LIMITED.

[1906 B. 574.]

Company—Memorandum of Association—Power to sell Undertaking for Shares in another Company and Distribute same in Specie—Reconstruction—Proposed Sale of Undertaking for partly-paid Shares—Voluntary Liquidation—Option to Members of old Company to take up new Shares—Time Limit for exercising Option—Realization of rejected Shares—Scheme for Distribution of Proceeds of Realization among Dissentients—Unfairness—Injustice—Ultra Vires.

A company was empowered by its memorandum of association to sell its undertaking for shares in any other company, and to distribute any of the property of the company among the members in specie. Part of its nominal capital had been issued and was fully paid. The company was in need of further capital, and, being unable to place its unissued shares, a scheme for reconstruction was prepared providing for the sale of the undertaking and assets of the company to a new company in consideration (inter alia) of partly-paid shares in the new company of the same number and nominal amount as the fully-paid shares in the old company, and that if the old company should go into liquidation before the shares were allotted, every member of the old company in respect of each share therein held by him was to be entitled to claim an allotment to himself of one partly-paid share in the new company. A time limit

(1) The defendant in *Victorian Daylesford Syndicate, Ld.* v. *Dott*, [1905] 2 Ch. 624, having appealed, the appeal came on for hearing on April 27, 1906, and was dismissed without argument in consequence of the decision of the Court of Appeal in *Bonnard* v. *Dott*.

KEKEWICH J.

1906

BISGOOD v. NILE VALLEY COMPANY, LIMITED.

was fixed within which members of the old company were to exercise their option to claim such an allotment; and with regard to the proportion of the shares in the new company which members of the old company should be entitled to claim, but should not claim within the time limit, the liquidator was to sell the same in such manner as he in his absolute discretion should think fit, and the net proceeds of sale were to be distributed rateably in accordance with their rights and interests among the members who had not so claimed. This scheme was embodied in a draft agreement between the two companies, and a resolution adopting and authorizing the directors to enter into the agreement with the new company, when formed, was duly passed. On a motion by two dissentient members to restrain the company from acting on the resolution:—

Held, that the agreement was a device for compelling shareholders of the old company either to subscribe further capital or else to accept a share of the proceeds of sale of the unclaimed shares in the new company to be ascertained under a scheme of distribution which was likely to be unfair and work injustice to the dissentient members, and was, at any rate, not part of the bargain under which they had originally subscribed for their shares; and that the agreement was ultra vires.

Manners v. *St. David's Gold and Copper Mines, Ld.*, [1904] 2 Ch. 593, applied.

MOTION.

The defendant company was incorporated under the Companies Acts, 1862 to 1900, on April 6, 1903, under the name of the Nile Valley (New) Company, Limited, with a nominal capital of 250,000*l.*, divided into 250,000 shares of 1*l.* each, of which 218,257 shares had been issued and were fully paid. The shares were all of the same description, and there were no debentures.

The company carried on business as an exploration, financial, investment, and mining company, and s. 3 of the memorandum of association stated that the objects for which the company was established were (inter alia) the following:—

"(10.) To sell, let, dispose of, or deal with the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of this company. To distribute any of the property of the company among the members in specie."

"(15.) To sell, improve, manage, develop, lease, mortgage, dispose of, turn to account or otherwise deal with, all or any part of the property and rights of the company."

"(20.) To distribute among the members in specie by way of dividend or bonus, or upon a return of capital, any property of the company or any proceeds of sale or disposal of any property of the company, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law."

The material provisions of the company's articles of association were as follows:—

"84. The holders of any class of shares in the capital of the company for the time being issued, whether before or after winding-up, shall have power, by an extraordinary resolution passed at a meeting of such holders, to consent on behalf of all the holders of shares of the class . . . . in the case of a sale of the undertaking or all or any of the assets of the company, to any special scheme of distribution of the proceeds of sale, although not in accordance with the legal rights of the members, and such resolution shall be binding upon all the holders of shares of the class, provided that this article shall not be read as implying the necessity for such consent in any case in which, but for this article, the object of the resolution could have been effected without it."

Article 85 provided that the quorum at any meeting for the purpose of the last preceding clause should be members holding or representing by proxy at least one-half part of the issued shares of the class.

Article 116 empowered the directors, amongst other things, "To negotiate for, and, subject to the approval of the company in general meeting, contract for the transfer of its undertaking or any part thereof as a going concern, with or subject to the benefit of all or any part of its property or assets, and subject or not subject to all or any of its obligations and liabilities."

Article 156 provided that, "In the event of the liquidation of the company, the surplus assets of the company, available for distribution among the members, shall belong to and be divided among the members in proportion to the amounts paid up or credited as paid up on the shares held by them respectively."

Article 157 provided that, "If the company shall be wound

KEKEWICH J.
1906
BISGOOD v. NILE VALLEY COMPANY, LIMITED.

up (whether voluntarily or otherwise), the liquidators may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company, and may, with the like sanction, vest any part of the assets of the company in trustees upon such trusts for the benefit of the contributories as the liquidators, with the like sanction, shall think fit, and if thought expedient, any such division may be otherwise than in accordance with the legal rights of the contributories of the company, and in particular any class may be given preferential or special rights, or may be excluded altogether or in part, but in case any division other than in accordance with such legal rights shall be determined on, any contributory who would be prejudiced thereby shall have a right to dissent and ancillary rights as if such determination were a special resolution passed pursuant to s. 161 of the Companies Act, 1862."

In May, 1904, by special resolution duly passed and confirmed, the name of the company was changed to the Nile Valley Company, Limited.

On February 3, 1906, the company issued its report, balance-sheet, and profit and loss account for the year ending July 31, 1905, shewing a loss for the year of 999*l.* 19*s.* 10*d.* A copy was sent to each shareholder, together with a circular, also dated February 3, 1906, in which the directors stated that, owing to the position of the market, it had been quite impossible to carry into effect the arrangements they had made for the placing of the 31,743 unissued shares of the company, and that the funds then in hand were not sufficient to enable the company to bring its operations to a successful issue. They had therefore decided to ask the shareholders to authorize the sale of the undertaking and assets of the company to a new company, to be incorporated with a capital of 250,000*l.*, in 250,000 shares of 1*l.* each. After stating that the draft of the agreement carrying out the sale was open to the perusal of the shareholders at the company's office, he circular continued :—

"The following are the short heads of the scheme :—

"(1.) All the assets and undertaking of this company are to be sold to the new company for 218,257 shares of 1*l.* each.

credited as 16*s.* paid, that is to say, with a liability of 4*s.* per share.

"(2.) It is then proposed to ask the shareholders to put the company into liquidation, so that each shareholder of the present company shall be entitled to subscribe for one new share credited as 16*s.* paid for each share now held by him. All shares not subscribed by shareholders will be sold by the liquidator. The liquidator will also have the call at par for one year on the unissued shares, viz., 31,743, and if, as is hoped, the market conditions improve and the further development of the mine is successful, a substantial sum may be realized, the whole of which will be applied towards recouping the present shareholders the 4*s.* a share they are now asked to subscribe.

"(3.) As part consideration for the sale the new company is to pay the sum of 10,000*l.* cash or any less sum that may be necessary to discharge all liabilities of the old company, including advances and interest thereon, and in payment of the reconstruction expenses of the new company and the liquidation of the old company.

"If the shares are subscribed, the working capital available after meeting the liabilities, &c., is estimated to amount to over 30,000*l.*, which the directors believe will be sufficient."

Accompanying the report and circular was a notice, also dated February 3, 1906, of an extraordinary general meeting to be held on February 12, 1906, for the purpose of passing a resolution approving and authorizing the directors to enter into the agreement for sale next hereinafter mentioned to a new company proposed to be formed for the purpose of acquiring the undertaking, assets, and liabilities of the old company.

The draft of the agreement carrying out the sale was expressed to be made between the defendant company (therein called the old company) of the one part and the Nile Valley (New) Company, Limited (therein called the new company) of the other part, and after providing for the sale of the undertaking and business of the old company to the new company in consideration (inter alia) of the new company undertaking the debts, liabilities, and obligations of the old company; and of the new company, in the event of the old company going into liquidation within six

KEKEWICH J. 1906 BISGOOD v. NILE VALLEY COMPANY, LIMITED.

calendar months from the date thereof, paying and indemnifying the old company against all the costs and expenses of the winding-up of the old company and of carrying the sale into effect, continued as follows:—

"(4.) As further part of the said consideration for the said sale the old company or its liquidator shall have the right to subscribe at par for all or any of 31,743 unissued shares of the new company at any time or times during one year from the date of this agreement.

"(5.) As the residue of the consideration the new company shall allot and issue to the old company or its nominees 218,257 shares in the new company of 1*l.* each with the sum of 16*s.* credited as having been paid up thereon to be numbered 1 to 218,257, both inclusive.

"(6.) If the old company shall go into liquidation before the said 218,257 shares shall have been allotted to the old company or its nominees the following provisions shall apply, and the said shares shall be allotted accordingly:—

"(*a*) Every member of the old company (including holders of bearer share warrants) shall in respect of each share therein held by him be entitled as of right to claim an allotment to himself or herself or to his or her nominees of one 1*l.* share in the new company with the sum of 16*s.* credited as having been paid up thereon and the new company shall allot the shares so claimed. The remaining 4*s.* per share shall be paid as to 1*s.* when the claim is made and as to 1*s.* on allotment and as to the balance as and when required.

"(*b*) The liquidator of the old company shall within fourteen days after the old company shall have gone into liquidation give notice in writing to each registered member of the old company stating the number of shares the member is entitled to claim as of right under this agreement and the amount per share payable on claiming the same and the situation of the registered office of the new company and the time within which the claim for allotment as aforesaid must be sent into the new company and there must be enclosed therewith proper forms of claim addressed to the new company for signature by the member. . . . ." This clause then went on to provide that the

notice in the case of registered members should be given by sending it through the post, service being deemed to be effected at the time of posting, and in the case of holders of bearer share warrants, should be given by advertisement in London and Egyptian daily newspapers as therein mentioned, service being deemed to be effected on the day of the publication of the newspaper containing the first advertisement.

"(*c*) A registered member entitled to claim an allotment as aforesaid must claim the same within fourteen days from the date of the notice to be given by the liquidator informing him thereof or within such extended time as may be fixed by the liquidator and a holder of bearer share warrants entitled to claim an allotment as aforesaid must claim the same within one calendar month from the date of the first advertisement of the notice of such right to claim as hereinbefore provided or within such extended time as may be fixed by the liquidator by sending into the new company a claim in writing for the allotment of the shares and such claim must be signed by the member making the same and must be accompanied by a sum of 1*s*. per share claimed and where it requests that the allotment of shares may be made to a nominee or nominees of such member it must be countersigned by such nominee or nominees. A holder of bearer share warrants shall at the same time as he sends in his claim to the new company deposit the share warrants in respect of which he claims an allotment at such place as the liquidator of the old company shall appoint together with a statement in writing of his name and address.

"(*d*) As regards that proportion of the said shares in the new company which members of the old company shall be entitled to claim as aforesaid but shall not within the periods of fourteen days or one calendar month within such extended time as aforesaid claim the said liquidator shall use his best endeavours to sell the same for what they will fetch and the proceeds of sale thereof after paying all expenses of and incident to the sale shall be distributed rateably among the members who if they had claimed would have been entitled to such shares in accordance with their rights and interests and in substitution for such shares the new company shall upon the

KEKEWICH J. 1906 BISGOOD v. NILE VALLEY COMPANY, LIMITED.

request of the said liquidator allot to such purchasers the shares sold to them respectively credited as aforesaid but such request to be effective must be made within three months from the date of the liquidation or such later date as may be agreed upon by the new company.

"(*e*) Any such sale as aforesaid may be made by the said liquidator either by public auction or private contract and either together or in lots and either with or without reserve and subject to any special or other conditions with power to sell part thereof with calls of additional shares and with power to buy in and resell and generally upon such terms and conditions and in such manner as the said liquidator shall in his absolute discretion think fit.

"(7.) The company or its liquidator as the case may be shall be entitled in its or his absolute discretion to exercise the right given to it or them under clause 4 hereof at any time or times and to sell grant options over or otherwise deal with all or any of the said shares at such times at such prices and in such manner and generally on such terms and conditions as it or he shall think fit and the net proceeds derived from such sale of or grant of options over the said shares or any of them shall belong in case of the company to the company as part of its assets and in the case of the liquidator shall be held by him for the benefit of and be distributed among the whole of the members of the old company (including holders of bearer share warrants) whether they shall have claimed an allotment of shares or not rateably according to their rights and interests respectively."

Clause 12 of the agreement provided that if within four calendar months from the date thereof 100,000 shares should not be claimed by the old company or by the members of the old company, the new company might by notice in writing to the old company or its liquidator determine the agreement.

At the extraordinary general meeting of the defendant company held on February 12, 1906, at which 58,000 shares were represented either by the shareholders in person or by proxies, the draft agreement for sale was read and explained, and the resolution approving and authorizing the directors to

enter into the same with the new company, when formed, was duly passed. The plaintiff Bisgood was present at the meeting, and opposed the resolution on the ground that the scheme was ultra vires and the contemplated sale a bogus one.

On the same day the two plaintiffs, who were the holders of twenty fully-paid shares of the defendant company, commenced this action for a declaration that the resolution in question was ultra vires the defendant company and void; and for consequential relief.

On February 14, 1906, a further notice was sent to the shareholders that an extraordinary general meeting of the company would be held on February 22 for the purpose of passing a resolution for the voluntary winding-up of the company.

The plaintiffs now moved for an injunction to restrain the company from acting upon the resolution passed on February 12, and from entering into or carrying into effect the proposed agreement.

P. O Lawrence, K.C., and *Beebee*, for the plaintiffs. It is not suggested that there is any want of bona fides about this proposed scheme. The only question is whether the company has power to carry it out. We submit that this is not such a sale and disposition of its undertaking and assets as is contemplated by the company's memorandum of association. The company has no power to fix a time limit within which claims for the allotment of shares in the new company are to be sent in by the shareholders, and sub-clause (*c*) of clause 6 of the draft agreement fixing such a limit is of itself sufficient to vitiate the agreement. Moreover, the proposed rateable distribution of the proceeds of sale of the unaccepted shares amongst the dissentients is not a proper distribution nor such a distribution as is contemplated by the memorandum of association, and may work injustice to the dissentient shareholders.

It has often been argued, but never decided, that this kind of reconstruction scheme, which is an attempt to deprive shareholders of their rights under s. 161 of the Companies Act, 1862, can be carried out. The most recent case in which a reconstruction scheme of this nature has been considered is

KEKEWICH J.
1906
BISGOOD v. NILE VALLEY COMPANY, LIMITED.

Manners v. *St. David's Gold and Copper Mines, Ld.* (1), where it was held that the agreement was not a contract for sale within the contemplation of the memorandum of association, but was a device to compel holders of fully-paid shares to contribute further capital or forfeit their interest in the company, and that it was ultra vires. There is a difference between the agreements in the two cases, inasmuch as in that case the agreement provided that the shares which were not accepted should be sold and applied in payment of the debts and obligations of the old company. That, of course, was a clean forfeiture. In the present case it is proposed that the shares shall be pooled and the proceeds of sale divided rateably among the dissentients. Again, in that case it was attempted to exclude the rights given to dissentients by s. 161, but that has not been done here. The broad view which the Court of Appeal took in that case was that the scheme was a device to make shareholders subscribe further capital or else forfeit all share and interest in the company as a going concern.

In *Mason* v. *Motor Traction Co., Ld.* (2), which was the case of a company selling its undertaking for partly-paid shares in another company, Buckley J. pointed out the distinction between the case of a company selling for partly-paid shares and a case where the shareholders are compelled to become the holders of the shares and come under liability. In the present case it is sought to force the shareholders either to take the shares in the new company with further liability, or else to be content with a rateable distribution of the proceeds of sale of the shares which they were not willing to accept. Such a scheme is, we submit, according to the authorities already referred to, clearly ultra vires.

Stewart-Smith, K.C., and *Shewell Cooper*, for the defendant company. This is a common form agreement by way of sale under the memorandum of association. A company in the position of this company must either get more capital or be wound up, and, that being so, the directors have tried to carry out a scheme which will procure the greatest possible advantage to the shareholders.

(1) [1904] 2 Ch. 593. (2) [1905] 1 Ch. 419.

The fixing of a time limit within which the claims are to be made does not vitiate the agreement. There must be some time limit. *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1) and *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine* (2) are authorities for such a limit. Those were decisions under s. 161 of the Companies Act, 1862, but the same principle applies, and there is no reason why there should not be a time limit on a sale under the memorandum of association.

The company has endeavoured to make the best arrangement possible for the advantage of the dissentient shareholders, and there is no real ground for the objection which has been taken to the rateable distribution. It is not a drawback to have a liquidator exercising some control over the shares, because they can be sold more advantageously in blocks than if they are peddled out. There is nothing to prevent the liquidator from selling a line of shares and then dividing up the proceeds between the parties entitled. The meaning of sub-clause (*d*) of clause 6 is perfectly clear. The "rights and interests" of the members are not concluded by the agreement, which leaves the question open, and if the liquidator distributes otherwise than in accordance with the rights and interests of the parties there can be an application to the Court. It is a matter of indifference to the company what becomes of the proceeds of sale of the unaccepted shares, and in that respect this case is distinguishable from *Manners* v. *St. David's Gold and Copper Mines, Ld.* (3), where the company obtained the benefit of the proceeds of sale. That case does not really apply; for there the scheme was confiscatory, and on that ground the Court of Appeal found that the agreement was ultra vires. There is no confiscation in the present case.

The scheme must be regarded from the point of view of a commercial scheme. The company has done its best in the circumstances. If this agreement were abandoned and the company wound up, and it was then proposed to sell under s. 161, a dissentient shareholder would be entitled to an aliquot share of the assets after they were ascertained, but under this

(1) (1889) 43 Ch. D. 452. (2) [1899] 2 Ch. 616.
(3) [1904] 2 Ch. 593.

KEKEWICH J. 1906 BISGOOD v. NILE VALLEY COMPANY, LIMITED.

scheme he is to get, without liability, a share of the proceeds of sale of shares in a company in which the other shareholders have willingly taken up shares with a liability. In this way the dissentients will get more than if the company were being wound up. The scheme is not, therefore, open to the objection that it is ultra vires because it is unjust.

KEKEWICH J. I have no doubt that this agreement cannot stand as it is. It has been admitted that the sale is not intended to be effected under the provisions of ss. 161 and 162 of the Companies Act, 1862. The company is to be wound up, and the sale of its undertaking and assets is to be carried through in that winding-up and through the machinery of the liquidator, but not under the statutory provisions to which I have referred. It is not necessary, therefore, to inquire whether this scheme meets the requirements of the statute, because the statute has nothing to do with it.

There is to be a voluntary liquidation of the company, but the company is still in existence and carrying on business, and is still entitled to sell its undertaking as a going concern, provided, that is, that the memorandum of association gives it power to sell at all.

The first question, therefore, is whether the company has power to sell. Under sub-ss. 10 and 15 of s. 3 of the company's memorandum of association there is a power to sell not only "the undertaking," but also "all or any part of the property and rights of the company." The company, then, can sell its undertaking or the whole or any part of its assets as a going concern. It may sell its undertaking for shares; and I will assume, although it is not expressed, that it may also sell any part of its property and rights for shares. If a company has power to sell for shares, it may sell for partly-paid shares in some other company. So far there is no difficulty. The company, therefore, may make a sale of its whole undertaking and assets to another company for partly-paid shares in that other company. To work that out properly, all the shares should be under the control of the liquidator, or, if there were no liquidator, under the control of the directors. The shares would have to

be realized as part of the assets of the company, and after payment of the costs and expenses, and the company's debts, the proceeds would have to be divided, in a case of this kind where all the shares are fully paid, among all the shareholders in proportion to their nominal interest in the company. That would be the proper mode of proceeding. In the present case, however, it is proposed not to follow that course, but to have the shares in the new company allotted direct to the shareholders in the old company. I am not sure that the company has the right to do anything of the kind. The shares in the new company are intended to be partly-paid shares, and I do not see how this old company, or the liquidator, can compel a shareholder in the old company to take either a rateable proportion or any other number of shares in the new company, imposing thereby a liability upon him. That difficulty in the way of the scheme has been foreseen, and an attempt has been made to get over it. Those shareholders who are willing to accept partly-paid shares, with the liability, are to have their shares; but what is to be done in the case of those who are not willing? They cannot be forced to take the shares in the new company. They are entitled to their share in the assets of the old company, including, of course, as it is a winding-up, their share in their proper proportion of the proceeds of those shares which are allotted to the consenting shareholders. But it is not proposed to give them anything of that kind. It is proposed, as they are obstinate and refuse—I am not using those words in any offensive sense—to take any allotment of shares, that they shall have something else. What is that something else to be? Those shares which are not accepted are to be sold by the liquidator for what he can get for them. There is a certain time limit within which the option of refusal is to be expressed, and there is a certain time within which the liquidator is to sell. As at present advised, I see no objection to a reasonable time limit in either case, and I see no reason for supposing that the time limit fixed in either case is unreasonable.

The liquidator is to sell the shares in question, not necessarily, of course, all at once, because probably that would be impossible, but he is to sell them when and as he can. If, eventually, he has

KEKEWICH J.

1906

BISGOOD v. NILE VALLEY COMPANY, LIMITED.

to sell them for "an old song," as the saying is, then for an old song the shares must go. He must realize the shares, and when he has all the proceeds, or, if he prefers, when he has a substantial sum in hand, he is to distribute it, after paying the expenses of the sale, among the dissentient members who have not come in, and they are to have a share in this fund whether it be small or large.

Now, I confess I cannot follow the meaning of the language in which the method of rateable distribution is expressed. I am told that its meaning is perfectly clear, and that it only means that all the rights and interests of the shareholders are to be taken into consideration at the time of the distribution. I do not understand what rights and interests have to be taken into consideration, or how there can be anything open to discussion. The expression "rateably" seems to me necessarily to imply that there is some proportion which has to be ascertained, and that proportion must necessarily be the value that the interest of the particular shareholder receiving his quota bears to the total interest of those who have stood out. I do not think that there is any other right or interest to be considered. Therefore, each shareholder in the distribution, or in each distribution, as the case may be, will get his share with the others—his proportion of the proceeds of sale, less expenses. That may be extremely unfair to some shareholder. His shares may have been sold at a good price on the market, then there may have been a slump—to use a vulgar expression—and the rest of the shares may have been sold, as I said before, for an old song. Yet those whose shares were sold for an old song will have their proportion calculated exactly in the same way as his, although his shares were sold for a larger sum. That seems to me to be unfair and to work injustice.

But apart from that, is this scheme fair to dissentient shareholders at all? It seems to me that it is putting a pistol to their heads, and telling them, "If you do not come in, all you will get is your proportion, whatever it may be, of the total proceeds of sale of the shares of all the dissentient shareholders; if you do come in, you will have to accept shares with a liability, and if you will not take them—and we admit

that we cannot force you to take them—then you will only have what you can get in the way indicated, which may be a very small amount. You will have nothing whatever to do with the new company or its shares, of course, because you said you would stand out. All you get is your rateable proportion, ascertained in that way." That seems to me to be unfair.

I do not propose to go into the rest of the agreement, because I think it all hinges on this arrangement. In my opinion it comes precisely within the description given by Romer L.J. in *Manners* v. *St. David's Gold and Copper Mines, Ld.* (1) He says: "It is a scheme whereby the shareholders of a company who have paid up their shares in full and are not under any liability to furnish any further capital are told, 'You must pay up more capital, and if you do not you shall forfeit all share and interest in this company as a going concern.'" The distinction between that case and this is obvious, for there the dissentient shareholders were to get nothing, inasmuch as the proceeds of sale of their shares were to go away from them altogether. The observations to be found in Romer L.J.'s judgment and in the other judgments in that case were, of course, relied upon in this case. No doubt there is this difference, that in the present case the dissentient shareholder is to get his rateable proportion of the proceeds of sale. But is that a real difference of substance? I think not. It seems to me to come to the same thing. It is in effect saying to the dissentient shareholder, "We cannot force you to take the shares in the new company and come under liability, but unless you do, we can and will force you to forfeit your shares." Whether the company forfeits them by taking them all away, or forfeits them by dealing with them in a way that is not sanctioned by any contract between the parties, and not even to be justified by any passage in the memorandum or articles of association, seems to me to be perfectly immaterial. The company takes away from the shareholders that which is their own, and says to them, "If you do not come in, at any rate you shall not have your shares, you shall have something else," and I do not think that that "something else" will be ascertained fairly. But, whether

(1) [1904] 2 Ch. 593, 606.

KEKEWICH J.
1906
BISGOOD v. NILE VALLEY COMPANY, LIMITED.

it is ascertained fairly or not, it is not part of the bargain under which the dissentient shareholders originally subscribed for their shares. It is not in the bond.

I think the shareholders, if they so desire, are entitled to insist upon the bond, and, therefore, I propose to restrain the company from proceeding to act on the agreement in its present shape. How far alterations will modify all difficulties is another matter, but I do not think that the agreement can stand as it is.

I must, therefore, grant an injunction restraining the company from entering into or carrying into effect the agreement as it now stands.

Solicitors: *Bisgood & Marshall; Worthington Evans, Dauney & Co.*

R. M.

KEKEWICH J.
1906
March 22.

In re VICKERSTAFF. VICKERSTAFF *v.* CHADWICK.

[1906 V. 68.]

Administration—Probate Action—Costs to come "out of the Estate"—Insufficient Personalty—Liability of Real Estate—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-ss.* 1, 3; *s.* 2, *sub-s.* 3—*Rules of Supreme Court, Order* LXV., *r.* 14D—*Practice—Particular Portions of Estate—Costs—Incidence—Direction by Court.*

By the judgment in a probate action pronouncing against the validity of the will of the deceased who died since the commencement of the Land Transfer Act, 1897, the costs of the plaintiffs propounding the will were ordered to be paid "out of the estate." The personal estate of the deceased proving insufficient:—

Held that, by virtue of Part I. of the Act, the word "estate" now meant the real as well as the personal estate of a person dying since the commencement of the Act, and that under sub-s. 3 of s. 2 the real estate of the deceased was subject to the same liability as his personal estate for the costs in question and must bear those costs.

The Probate Division having acquired jurisdiction over real estate by virtue of Part I of the Act, the ground upon which the decision in *In re Shaw*, [1894] 3 Ch. 615, was based has disappeared.

It is open to the Court under Order LXV., r. 14D., to distinguish between various portions of the estate, for instance between realty and

personalty, and to impose costs accordingly. If the Court makes no such distinction, the costs are payable out of the entirety of the estate in due order of administration.

ADJOURNED SUMMONS.

The plaintiff, Elizabeth Ann Booth Vickerstaff, was the widow of the above-named deceased, Edwin Vickerstaff, who died on January 21, 1905, having, on the day previous, executed a will whereby he gave all his property, real and personal, to his mother, Hannah Boyden, whom he appointed his sole executrix.

Hannah Boyden died on January 26, 1905, having by her will appointed the present defendants, H. Chadwick and W. E. Allen, her executors.

On November 23, 1905, the present plaintiff successfully defended an action in the Probate Division brought by the present defendants, as plaintiffs, for the purpose of setting up the will of the above-named deceased and claiming that letters of administration, with the will annexed, of his estate might be granted to them as the personal representatives of Hannah Boyden. The jury found that the will was duly executed, but that the deceased did not know and approve of the contents of the will, and was of unsound mind at the time when the same was executed; and by his final decree the President pronounced against the force and validity of the will, and ordered the costs of the plaintiffs in that action to come out of the estate.

On December 11, 1905, letters of administration of her deceased husband's estate were granted to the present plaintiff.

The value of the personal estate amounted to 102*l.* 4*s.* 9*d.*, and of the real estate to 2101*l.* 5*s.* The debts alone amounted to 161*l.* 13*s.* 9*d.*

On January 27, 1906, the present plaintiff took out this summons for the determination of the question whether, in the course of the administration of the real and personal estate of the deceased, his real estate was liable to be charged with the payment of the costs of the present defendants, incurred as plaintiffs in the action in the Probate Division.

By an order dated February 8, 1906, made in the action in the Probate Division, the present plaintiff was ordered to pay to

KEKEWICH J. 1906 VICKER-STAFF, *In re.* VICKER-STAFF *v.* CHADWICK.

the solicitors of the present defendants the sum of 151*l.* 10*s.* 3*d.*, being the amount of their taxed costs in that action.

Stewart-Smith, *K.C.*, and *Whinney*, for the plaintiff. Before the Land Transfer Act, 1897, came into operation, it was well settled that where costs in a probate action were ordered to be paid "out of the estate," the costs were payable out of the personal estate only, the Probate Division having no jurisdiction to order costs to be paid out of the real estate: *In re Shaw* (1), where all the authorities are summed up.

Sub-s. 3 of s. 2 of the Land Transfer Act, 1897, gives the legal personal representative power to pay costs out of real estate as if it were personal estate, but there is no direct authority on the question whether such an order as this charges the real estate. In *In re Prince* (2), Stirling J. says: "It was admitted upon the argument before me, and according to the authorities it is quite clear, that the order of the Probate Division of November 22, 1897, affected only the personal estate of the testator. It will hereafter have to be borne in mind that the Land Transfer Act, which came into operation on January 1 of the present year, has made an alteration in that respect, and that the Probate Division, as I understand, has now jurisdiction to deal with the realty as well as the personalty." That was a case in which it was decided that the costs of an unsuccessful action in the Probate Division, although ordered to be paid out of the testator's estate, were not testamentary expenses, and, therefore, this expression of judicial opinion upon the effect of the Land Transfer Act, 1897, was obiter.

Order LXV., r. 14 D. (3), made since the commencement of the Land Transfer Act, 1897, does not mention real estate, and the omission is significant, for, if there had been an intention to include real estate, it would have been expressly mentioned. That rule was the subject of judicial decision in *Dean* v.

(1) [1894] 3 Ch. 615.

(2) [1898] 2 Ch. 225, 227, 228.

(3) Order LXV., r. 14 D (Rules of the Supreme Court, October, 1904, r. 2), provides that: "In any Probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what portion or portions of the estate such costs shall be paid, and such costs shall be paid accordingly."

Bulmer (1), in which a somewhat wide view was taken of it, and the Court ordered the costs of both plaintiff and defendant to be charged on and paid out of the corpus of certain real estate devised by the will to successive tenants for life. There is nothing in the report of that case to shew that the Land Transfer Act, 1897, was referred to or was in the learned judge's mind, and there is no statement that the personal estate was insufficient. We submit that the real estate is not charged by this order with the payment of costs. It is clear that before the Act it would not have been charged, and there are no words in the Act or Order LXV., r. 14 D., which enlarge the operation of such an order by making the real estate liable for the costs. Even if the Probate Division has jurisdiction over real estate, it does not follow that it has exercised it in this instance. This order is in the old form, and does not point to any intention on the part of the Probate Division to exercise its new jurisdiction.

[They also referred to *In re Jones* (2), *Charter* v. *Charter* (3), and *In re Peel.* (4)]

P. O. Lawrence, K.C., and *Austen-Cartmell,* for the defendants. The reason for the decision in *In re Shaw* (5) and the cases therein cited was that the Court of Probate had not jurisdiction over real estate. Since the Act, however, the real estate vests in all the executors named in the will: *In re Pawley and London and Provincial Bank* (6); and under the Act probate may be granted in respect of real estate only, although there is no personal estate. That clearly gives the Probate Division jurisdiction over real estate, and makes the reason for the decision in *In re Shaw* (5) no longer in point. This order for payment of costs out of the estate, therefore, applies to real estate as well as personal estate.

Stewart-Smith, K.C., in reply.

KEKEWICH J. In this case I have to determine the effect of a few words in a decree made by the late President of the Probate Division in a probate action. After pronouncing against the

(1) [1905] P. 1.
(2) [1902] 1 Ch. 92.
(3) (1876) 3 Ch. D. 218.
(4) [1899] W. N. 208.
(5) [1894] 3 Ch. 615.
(6) [1900] 1 Ch. 58.

KEKEWICH J.

1906

VICKER-STAFF, *In re.*

VICKER-STAFF v. CHADWICK.

validity of the will, the decree goes on to order the costs of the plaintiffs in the action to come "out of the estate." What does that mean? Does it mean that the costs are to come out of the estate generally, real and personal, or out of the personal estate only? If Part I. of the Land Transfer Act, 1897, had not yet come into operation, this question would at the present day have been unarguable. It was decided in *In re Shaw* (1) that "the estate," when used in this way in an order of the Probate Division, meant the personal estate only, for the one and conclusive reason that the Probate Division had no jurisdiction to deal with the real estate. So far, so good. Then comes the question whether the same reason holds good now. Since *In re Shaw* (1) was decided, the Land Transfer Act, 1897, has come into operation. Part I. of the Act establishes a real representative who is not a distinct person from the personal representative, but is necessarily the same, so that instead of being merely an executor or administrator, and having only the personal estate of the testator vested in him, he now has the real estate also vested in him. It is in him, and, subject of course to its application for purposes of administration, it remains in him until the conveyance to the heir-at-law or devisee, as the case may be. That shews that from and after the commencement of the Act the grant of probate or letters of administration really extends to the real estate as well as the personal estate. Further, by sub-s. 3 of s. 1, to which my attention has been called, it is enacted that there may be a grant of probate or letters of administration in respect of real estate only, there being no personal estate to which it could extend. That carries the matter a long way, because it gets rid of the reasoning upon which the decision in *In re Shaw* (1) was founded, inasmuch as since the commencement of the Act the Probate Division has jurisdiction over real estate. Whether that would be enough of itself or not I need not say, because it seems to me that sub-s. 3 of s. 2 of the Act sets the matter at rest, for not only does the Act vest the real estate in the legal personal representative, but this sub-section provides that the "real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and

(1) [1894] 3 Ch. 615.

with the same incidents, as if it were personal estate." The real estate, therefore, is under the same liability as is the personal estate in respect of costs, and, that being so, it seems to me to be inconsistent to say that the order in this action means only the personal estate when the Legislature has expressly provided that "the estate" shall, as regards liability to costs, mean the real estate as well as the personal estate of the deceased. In my opinion, therefore, an order of this kind must mean something quite different from what it did before the Act.

Then it is said that Order LXV., r. 14D., made since the Act came into operation, ought to have specified real estate if it was intended to apply to real estate, and that as all reference to real estate has been omitted the rule only applies to personal estate. That seems to me to be unsound, because, as I have said, "estate" now by virtue of the Act means real and personal estate, and, both being included in the one term, it is left to the Court to say out of which the costs are to be paid. If the Court is satisfied that the costs were incurred over a particular portion of the estate, over realty for instance, the Court can say that the costs shall be borne by the real estate, or, if over personalty, then by the personal estate. This was done by Sir F. Jeune P. in *Dean* v. *Bulmer* (1), where the costs of both plaintiff and defendant were ordered to be charged upon and paid out of the corpus of devised real estate. But if the Court makes no distinction between the various portions of the estate, the costs are payable out of the entirety, and the proper distribution must be made in due course of administration. That can be done without difficulty here.

The order in this probate action says that the costs are to come out of "the estate," and, the personal estate being insufficient, the real estate is not only charged with the payment of the costs in question, but must bear them.

Solicitors: *Swann, Bradley & Co., for Challinors & Shaw, Leek; Robbins, Billing & Co., for Hacker & Allen, Leek.*

(1) [1905] P. 1.

R. M.

KEKEWICH J.

1906

March 27.

In re BARRY'S TRUSTS. BARRY *v.* SMART.

[1905 B. 2673.]

Divorce—Separation Deed—Alimony—Deduction of Income Tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), ss. 102, 103—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

A divorce suit was compromised by the parties agreeing upon a deed of separation, whereby it was referred to an arbitrator to determine the amount of the wife's alimony, and the arbitrator having fixed the amount, the husband, by a supplemental deed, covenanted to pay the annual sum awarded by the arbitrator to trustees in trust for the wife:—

Held, that the annuity was payable less income tax.

On July 19, 1900, Mrs. Barry presented a petition against her husband for dissolution of marriage and for custody of the seven children of the marriage. On March 10, 1901, the registrar made an order against the husband for alimony pendente lite. By this order the registrar allowed the wife a sum of 600*l.* per annum, including a sum of 150*l.* per annum which was already payable to her by her husband under a deed of March 12, 1900, for alimony, and a further sum of 600*l.* per annum for the maintenance and education of the children. This order remained in force until November, 1901, when the petition came on for hearing. On November 26, 1901, the parties agreed upon a deed of separation, whereby it was referred to the late Mr. Inderwick, K.C., to determine what provision ought to be made by the husband, and by what deed or deeds, in respect of (*a*) the wife's alimony, and (*b*) the maintenance and education of the children. On October 10, 1902, Mr. Inderwick made his award, which provided that the husband should pay 450*l.* a year to the wife for her life by way of alimony or maintenance, in addition to the sum of 150*l.* already secured by the deed of March 12, 1900, and should pay her a further sum of 40*l.* a year for the maintenance of each of the children. This award was carried into effect by a deed dated March 24, 1903, which was settled by Mr. Inderwick. This deed recited the separation deed of November 26, 1901, to

which it was expressed to be supplemental, and the award of Mr. Inderwick, and it contained a covenant by the husband with the trustees of the deed that he would during the life of the wife pay to the trustees in manner therein mentioned the sum of 450*l.* per annum in addition to the 150*l.* per annum payable under the indenture of March 12, 1900; and it was thereby declared that the said annuity of 450*l.* should be held by the trustees upon trust to pay the same to the wife for her separate use without power of anticipation. The deed also contained a covenant by the husband to pay to the trustees the sum of 40*l.* per annum for the maintenance of each of the children. In October, 1904, the husband, who hitherto had paid all the sums payable under this deed free of income tax, claimed, as regards future payments, to deduct income tax from the wife's allowance. He did not, however, insist upon deducting income tax from the children's allowances. This was an originating summons taken out by the wife for the purpose (among other things) of determining the validity of the husband's claim.

In the Probate Division it is the practice when an order is made for alimony to fix the amount of alimony by reference to the net income of the husband, but according to a statement made by the registrar to the judge in the course of the argument there is no settled practice as to whether or not alimony payable under an order of the Court is payable free of income tax. It appears that sometimes orders for alimony are made "less income tax" and sometimes without any such provision. There was no evidence that this question had been considered, either by the registrar, who made the order for alimony pendente lite, or by Mr. Inderwick in his award.

Stewart-Smith, K.C., and *Beddall*, for the wife. It is the settled practice of the Divorce Court, when an order is made for alimony, that the whole sum directed to be paid is payable without deducting income tax, because alimony is calculated on the husband's net income after making all deductions, including income tax, and the income tax must not be deducted twice over: *Frankfort* v. *Frankfort*. (1) A somewhat similar point arose in

(1) (1845) 4 Notes of Cases, 280.

KEKEWICH J.
1906
BARRY'S TRUSTS, *In re.*
BARRY *v.* SMART.

Warren v. *Warren* (1), before your Lordship, where you held that income tax ought to be deducted, but that case is distinguishable in its circumstances from the present, and *Frankfort* v. *Frankfort* (2) was not there cited.

[KEKEWICH J. referred to s. 102 of the Income Tax Act, 1842.]

P. O. Lawrence, K.C., and *E. Ford*, for the husband. 1. This annuity in favour of the wife is not equivalent to alimony under an order of the Court, but it is a sum payable by the husband "as a personal debt or obligation by virtue of a contract" within the meaning of s. 102 of the Income Tax Act, 1842. There is here a direct contract by the husband with the trustees for payment, and no distinction can be drawn between the 450*l.* and the 150*l.* payable under the previous deed. The husband is therefore entitled to deduct the amount of the tax from the payments: s. 40 of the Income Tax Act, 1853; and any contract which compels payment in full without deduction is void: s. 103 of the Income Tax Act, 1842. 2. As regards the practice of the Court in granting alimony, no doubt where the Court has allowed alimony on the footing that income tax has been deducted from the husband's income upon which the alimony is calculated, then income tax will not be payable over again: *Frankfort* v. *Frankfort* (2); but the general practice of the Court is governed by *Pemberton* v. *Pemberton* (3), which decided that the husband in making payments on account of alimony was entitled to deduct income tax. This case falls directly within *Warren* v. *Warren*. (1)

Cozens-Hardy, for one of the trustees of the deed.

Norman, for the other trustee.

Stewart-Smith, K.C., in reply. As regards the practice of the Court, the inference is that, where the words "less income tax" are not used, the practice is that the alimony is paid free of income tax. Having regard to the recitals in the deed of March 24, 1903, this covenant must be regarded not simply as a covenant for payment of an annuity, but as a covenant to give effect to the previous agreement, by which the wife's alimony was to be

(1) (1895) 72 L. T. 628; 43 W. R. 490.
(2) 4 Notes of Cases, 280.
(3) (1842) 2 Notes of Cases, 17.

determined, and therefore the practice of the Court as to alimony must be taken into account.

KEKEWICH J. By a deed of March 24, 1903, Mr. Barry covenanted with the trustees of the deed that he would during the life of his wife pay to them 450*l.* annually for his wife for her separate use, in addition to an annuity of 150*l.* payable under a deed of March 12, 1900. There can be no question but that that 150*l.* was payable less income tax. The question which I have to decide is whether the 450*l.* is payable in like manner. It would be strange if income tax were not also to be deducted from that sum, there being nothing said about it one way or the other. The point seems to me to be directly covered by a former decision of my own in *Warren* v. *Warren*. (1) That was a case of a deed of arrangement made in pursuance of an order of the Court. My decision was that I was bound to treat that arrangement as a contract—as an obligation by virtue of a contract, to follow the language of the Legislature in s. 102 of the Income Tax Act, 1842—and that, therefore, I had nothing to do with any practice of the Court. I found a contract to pay an annual sum, and I found an Act of Parliament which provided that annual sums payable by virtue of a contract were liable to deductions for income tax, and therefore it seemed that the annual sum payable under that deed must necessarily be subject to income tax. That case is on all fours with this. Here there is a plain covenant by the husband to pay to the trustees, with a declaration that they are to hold the money upon trust to pay to the wife; but the deed no doubt proceeds on recitals which shew the history of the case, which is this: There was an action in the Divorce Court between the husband and the wife, and it was settled on terms, the terms being that the husband should make a provision for the wife and children, which was to be determined by the late Mr. Inderwick. He inquired into the matter, and he made his award fixing the amounts to be allowed to the wife and the children, and he further settled the deed to which I have referred. It is said that you must go back and refer this deed to the previous proceedings, so that this must be treated, not simply

(1) 72 L. T. 628; 43 W. R. 490.

KEKEWICH J.

1906

BARRY'S TRUSTS, *In re.* BARRY *v.* SMART.

as a covenant to pay, but as a covenant to pay for a particular purpose, viz., for alimony and maintenance for the wife, and it is said that, having regard to that, you must consider how the sum was arrived at, and must look at the practice of the Court in which the proceedings were pending, and that if you find that according to that practice alimony is payable without any deduction for income tax, you must apply that rule to a case of this kind, and that then you will see that this money is not liable to deduction for income tax.

With regard to the practice of the Divorce Court on this point, the authorities help us very little. In *Pemberton* v. *Pemberton* (1) Dr. Lushington held that deduction must be made for income tax. That was decided in 1842. But in the later case of *Frankfort* v. *Frankfort* (2) the matter was gone into fully, under very different circumstances, by Sir Herbert Jenner Fust. He satisfied himself that, in fixing the proportion of income which was there to be paid to the wife, the husband's income on which the alimony was assessed was calculated as net income after paying income tax; and by a process of reasoning which to my mind is conclusive, he arrived at the conclusion that, the husband's income having been calculated less income tax in order to ascertain the alimony payable to the wife, it would be wrong to deduct income tax over again in respect of the proportion of income allotted to the wife. That is the whole case, and if I had a case of that kind before me I should certainly follow it without hesitation. It may be that that rule is not applicable to a covenant—to an obligation by contract. It may be that an entirely different rule is applicable to a case where there is an order of the Court, which is made in invitum, and to a case where the obligation is contractual. I am not now dealing with the case of an order of the Court, and I only touch upon this question because it has been argued that what occurred in *Frankfort* v. *Frankfort* (2) must have occurred here, and that the income of the husband must have been calculated after deducting income tax in order to fix the provision payable to the wife. As to Mr. Inderwick we have no information at all. We are thrown back upon what took place before the registrar, who decided that

(1) 2 Notes of Cases, 17. (2) 4 Notes of Cases, 280.

alimony should be allowed pendente lite. I do not think that that is evidence relevant to this case; but I have looked at his judgment to illustrate the practice of the Court, and unfortunately it does not give me any assistance. It does not appear how the 600*l.* a year which was to be paid to the wife was arrived at, and there is no evidence of any definite practice in the Probate Division on this point. The registrar of the Probate Division has told me that sometimes the order is made for payment of alimony less income tax and sometimes not. There is no settled practice which would induce me to come to the conclusion that alimony is as a matter of course, because it is alimony, payable free of income tax. If I had conclusive evidence that that was the practice of the Court I should wish to consider the matter further to see how far that was applicable to this case, but as at present advised I do not think that it applies. Here we have a contractual obligation, and a covenant which attempted to avoid the statutory obligation to pay income tax would be void. Putting aside any question of alimony, there is here a plain covenant to pay an annuity to trustees. It seems to me that upon principle, and upon the authority of *Warren* v. *Warren* (1), this annuity must be paid less income tax. The wife must pay the costs of the summons out of her separate estate, but there will be only one set of costs for the trustees, since they ought not to have severed.

Solicitors: *Booth & Smee; Harcourt, Sons & Rolt; Cox & Lafone.*

(1) 72 L. T. 628; 43 W. R. 490.

H. B. H.

FARWELL J.

1906

April 4.

STACKEMANN *v.* PATON.

[1905 S. 4228.]

Copyright—Photographs—Photographs of School—Photographs taken at Author's Risk—Good or valuable Consideration—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 1.

The plaintiffs, a firm of photographers, sent a traveller to the proprietors of certain private boys' and girls' schools offering to take photographs of the schools "entirely at their own risk." When leave was given, a member of the firm attended the school, and took such photographs of the grounds and exterior of the schools, and the interior of rooms and groups of pupils as the proprietors suggested or permitted. Proofs were afterwards submitted, and some copies were purchased by the proprietors. The proprietors sent copies of some of these photographs to the defendants in order that they might be reproduced and inserted in "P.'s List of Schools," an advertising publication issued by the defendants, and they were reproduced and inserted accordingly. The plaintiffs then registered the copyright of the photographs in their own names as authors, and brought this action against the defendants for an injunction to restrain infringement of their copyright:—

Held, that the permitting the photographer to enter the school and take photographs, on the chance of selling copies to the proprietors, was a "good consideration," and the photographs must be deemed to have been "made or executed for or on behalf of the proprietors of the schools for a good or a valuable consideration" within the meaning of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1, and the copyright, therefore, belonged to the proprietors of the schools, and not to the author of the photographs.

This action was brought by a firm of photographers to restrain the infringement of their copyright in two photographs, the one of Mr. Price's boys' school at Harrow-on-the-Hill, the other of the interior of the dining-room at Miss Cruse's girls' school at Weston-super-Mare.

The defendants were proprietors of "Paton's List of Schools, 1905," an advertising publication, space in which was let to proprietors of schools at so much a page, and filled up with such printed matter and views as the advertisers desired.

The circumstances under which the photographs were taken were apparently the same in each case, though in the case of Miss Cruse the evidence was not complete.

A traveller from the plaintiffs' firm first called at the school, and asked permission to send a photographer to take views "entirely at the plaintiffs' risk." Afterwards the younger plaintiff, George Stackemann, who was the son and partner of Karl Stackemann, the elder plaintiff, went to the school and took photographs of such parts of the exterior and interior of the school and grounds and groups of the pupils as the proprietor desired or permitted. Proofs were afterwards submitted and some photographs purchased by the proprietor.

Afterwards each of the proprietors, wishing to advertise their schools in the defendants' publication, sent to them one of the photographs in question, and the defendants made a block from it and printed a reproduction on a smaller scale in their publication.

The defendants' list was published on July 17, 1905. On November 8, 1905, the plaintiffs were registered as joint proprietors of the copyright in the two photographs under the Fine Arts Copyright Act, 1862. They brought this action on November 10; the evidence of infringement produced was the sale of a copy of the defendants' list to a clerk of the plaintiffs on November 9.

The registered photograph of Mr. Price's school was taken in July, 1904, and at the same time the plaintiffs took photographs of a schoolroom, bedroom, a carpenter's shop, a group of boys in running costume, and the cricket eleven arranged as if playing a match. These photographs were put together in an album, and Mr. Price had purchased and paid for copies to the value of about 15*l*. There was some conflict of evidence as to what happened at the time of taking the photographs, Mr. G. Stackemann stating that Mr. Price merely shewed him round, and he selected what points of view to take and which rooms would make the best pictures; while Mr. Price said that he had ordered exactly what photographs were to be taken. He considered the photographs were taken for him, and never supposed that the plaintiffs retained the copyright. When proofs were sent Mr. Price disapproved some of them, and they were taken again.

Miss Cruse, being an invalid, did not give evidence. The

FARWELL J. 1906 STACKEMANN v. PATON.

photographs in her case included some of the girls in fancy dress, and the interior of a bedroom in which a foreign governess was sitting. In this case only a few photographs were purchased, to the value of 17*s*.

MacSwinney, for the plaintiffs. It is clear on the evidence that the photographs were taken at the plaintiffs' instance. The whole question depends on the construction of s. 1 of the Fine Arts Copyright Act of 1862. (1) That section provides that the author of a photograph is entitled to the copyright unless it has been taken "for or on behalf of any other person for a good or a valuable consideration." The author of a photograph is, it has been established beyond question, the man who takes it: *Nottage* v. *Jackson*. (2) In this case the younger plaintiff took it, and he is entitled to the copyright unless the case can be brought within the proviso in s. 1 of the Act of 1862. That proviso is explained in Scrutton on Copyright, 4th ed. p. 193, and his statement of the law was adopted by the Court of Appeal in *Boucas* v. *Cooke*. (3) He says: "In the ordinary case of photographs taken for a paying customer the photographer will

(1) The Fine Arts Copyright Act, 1862 :—

"1. The author . . . . of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such . . . . photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed."

(2) (1883) 11 Q. B. D. 627.

(3) [1903] 2 K. B .227, 235.

be restrained from multiplication of copies both on the ground of copyright, if the sitter is registered as proprietor, the photograph being taken on his behalf for a valuable consideration; and even if he is not registered, on the ground of implied contract or confidence. Where the photographer asks for the sitting, and the sitter pays nothing for it or for copies of the photograph, the copyright will clearly be the photographer's, if he is the author as explained above. Where the sitter pays for some copies, though at a reduced rate, the case becomes more doubtful, and each case must turn on its special facts. There may be cases where the copyright is the sitter's, but the photographer has a licence to exhibit and sell copies. The question in each case is, 'Was the negative taken for or on behalf of the sitter for a valuable consideration?' If so, the copyright is the sitter's; if not, it is the author's. And it would seem that if the photograph is taken at the request of the photographer, even though the sitter afterwards pays for copies, it is taken on behalf of the photographer, and the copyright is his." And the Master of the Rolls says in *Boucas* v. *Cooke* (1): "The test there laid down is whether the negative is taken for the sitter for a valuable consideration. That is a perfectly fair summary of the law."

It is clear in this case that the photographs were taken at the photographer's request, and the law laid down in that passage governs the case. *Tuck & Sons* v. *Priester* (2) and *Fishburn* v. *Hollingshead* (3) shew that the registration is sufficient, though the defendants' book was published before the registration. The plaintiffs are trying the question as a test case of their rights. They only ask for an injunction, and will waive the questions of penalty, damages, and delivery up of copies of the defendants' book.

Upjohn, K.C., and *Ashton Cross*, for the defendants. It is impossible, after the decision in *Pollard* v. *Photographic Co.* (4), to suppose that the plaintiffs could sell these photographs broadcast. In the case of Mr. Price, if the facts proved were brought before a jury in an action to enforce a contract to

(1) [1903] 2 K. B. 236.
(2) (1887) 19 Q. B. D. 629.
(3) [1891] 2 Ch. 371, 380.
(4) (1888) 40 Ch. D. 345.

FARWELL J. 1906 STACKEMANN v. PATON.

purchase the photographs, he would unquestionably be found liable.

It is inconceivable that a schoolmaster, much less a schoolmistress, would admit a photographer to take photographs of all parts of his or her school, and of his or her pupils, on the terms that he might sell them to anyone; but that is what his having the copyright means.

The admission into the school to take photographs with a chance of selling them is a good consideration, and even, we submit, a valuable consideration. The principle of *Pollard's Case* (1) applies. There is an implied confidence that copies will not be published, which negatives the suggestion that the plaintiffs were to have the copyright.

MacSwinney, in reply, referred to *Ellis* v. *Marshall & Son.* (2)

Farwell J. This action relates to the copyright in two photographs, one being of the interior of a room in Miss Cruse's school at Weston-super-Mare, the other being of the house and grounds belonging to Mr. Price at Harrow-on-the-Hill.

With regard to Miss Cruse, there is no evidence to shew the inception of the arrangement under which that photograph was taken. The traveller who made the arrangement with her has left the plaintiffs' employment and cannot be found, and Miss Cruse has not been called. I am, therefore, left in the dark as to any antecedent transaction before the junior partner went down to take the photographs.

With regard to Mr. Price, the facts are rather different. There is no doubt that the traveller asked Mr. Price for permission to photograph and said something to the effect that it would be at the plaintiffs' own risk, in the sense that Mr. Price need not take any copies unless he wished. Mr. Price does not remember very much about it, as is not unnatural; but he does remember this, that at the time the application was made it happened that he wanted some photographs and had contemplated having some taken, and as these people appeared, he allowed them to take them. He gave permission, as I assume Miss Cruse must also have given permission, to the photographer to go all over the

(1) 40 Ch. D. 345. (2) (1895) 64 L. J. (Q.B.) 757.

house. He told him the rooms that he wished to have taken, and they were taken according to his directions. He summoned the boys of his school to form into a group in order that they might be photographed, and he also posed the cricket eleven in proper positions and had them photographed. He also pointed out the points of view from which it would be desirable to photograph the outside of the house. In both cases photographs were supplied and paid for, and the entries in the books of the plaintiffs shew that they were paid for about or soon after the time when the photographs were taken.

With regard to Miss Cruse, the plaintiffs must have got less than they hoped for, because 17*s.* certainly would not repay them for the expense of going down to Weston-super-Mare. That, however, is not very material.

The real question for my consideration is the true meaning of the 1st section of the Fine Arts Copyright Act of 1862. The first part of that section provides that the author of a photograph shall have the copyright. On the authorities I think it is plain that in this case the younger plaintiff was the author; he took the photographs, and I do not think Mr. Price, although he directed and guided, can be said to be the author of the photograph within the meaning of the Act.

Then follows this proviso. [His Lordship read the proviso set out above, and continued:—] The question is whether, on the facts stated, these photographs were made or executed for or on behalf of Mr. Price or Miss Cruse for a good or a valuable consideration. The Act of Parliament expressly distinguishes between "a good" and "a valuable" consideration, a fact that has been overlooked both in the passage quoted from Mr. Scrutton's book and by the Court of Appeal, if they intended to quote it as an exhaustive statement of the law, and not, as I think they did intend, as a summary of the law so far as it was germane to the case before the Court. It is plain that a good consideration will answer the words of the statute as well as a valuable consideration, and the real question is, having regard to the position of Miss Cruse and Mr. Price, Is not it a good consideration that they permitted the photographers to come all over their houses and gave them every assistance, admitted them to the arena, and

FARWELL J. 1906 STACKEMANN v. PATON.

allowed them to take the photographs? Is it conceivable that the mistress of a girls' school would allow photographs of this sort to be taken on the terms that the photographer was to publish them as he thought fit? It appears from one of the letters that one of the photographs, in the lady's case, was the photograph of the French governess's bedroom with the lady in it, and the French governess desired to have a copy of it. It appears to me that it would be monstrous to suppose that Miss Cruse could have anticipated a publication of such a photograph as that in any book that the photographers pleased without her permission.

In my opinion there is a perfectly good consideration given by the owners of the establishments to the photographers by allowing them to come on to the premises and to take photographs. Nor do I think that it makes any difference that the traveller told Mr. Price that he would not be bound to take any copies unless he thought fit. I quite agree with Mr. MacSwinney that if a man orders photographs he is not bound to take them if they are very bad, but if it is merely his caprice, and they are not really bad in the view of the judge or jury who try the case, then he is bound to take them and pay for them. That term may be perfectly well excluded in a particular contract without making it the less a contract as regards other matters. The photographer may say: "I am quite content to contract with you on the basis that not only shall you not be bound to take the photographs if they are bad, but you are to be the only judge of the question whether they are good enough to take or not." That does not make the whole transaction the less a contract for a good consideration.

I do not think the case cited of *Ellis* v. *Marshall & Son* (1) is an authority against the conclusion at which I have arrived. The only possible consideration which the learned judge could have found to have been given in that case was that the lady took the trouble to walk up to the photographer's room and sit in his chair; he thought that was not a sufficiently good or valuable consideration, and I respectfully agree with him.

Mr. MacSwinney has relied upon a passage quoted from

(1) 64 L. J. (Q.B.) 757.

Mr. Scrutton on Copyright by the Court of Appeal in *Boucas* v. *Cooke*. (1) It is to be observed there that the author and the Court of Appeal are both dealing simply with purchases for value. The statement begins: "In the ordinary case of photographs taken for a paying customer." Now it is not necessary, on the very wording of the Act, that a customer should pay in order to bring himself within the proviso in the 1st section; if he gives good consideration apart from payment he is equally a person entitled to the benefit of the proviso. The paragraph, therefore, is not exhaustive, and it is not stated in that way, but so far as it goes I have no doubt it is perfectly correct. Mr. MacSwinney relied very much on the passage at the end of the quotation: "And it would seem that if the photograph is taken at the request of the photographer, even though the sitter afterwards pays for copies, it is taken on behalf of the photographer, and the copyright is his." I think that has to be read and understood having regard to the fact that the only consideration with which the learned author and the Master of the Rolls, citing him, are dealing with is the payment of money. The word "request" there obviously refers to the passage further down on the same page, where the Master of the Rolls says the photographer could sue for his remuneration, "for what he did was done upon request." There it means such a request as would be necessary to support an action on the ground of an implied promise. Request is not the same thing as solicitation. The photographer may perfectly well solicit custom without making a request in the sense in which it is used in that paragraph. There it means such a course of conduct on the part of the photographer as excludes the presumption of a request by the sitter which would support an action for payment on an implied request. The request of the photographer cannot make any difference except as excluding the presumption of the sitter's request; if it were not so, the more pushing the photographer was the greater would be his rights to make free with the negatives which he had taken against the will and to the detriment of the person who had been taken. Take the case I suggested in argument of the photographer failing to make a passable

(1) [1903] 2 K. B. 235, 236.

FARWELL J. 1906 STACKEMANN v. PATON.

photograph which he could hope to compel payment for. Is it conceivable that he is allowed to publish that because he has not been paid for it? He has not been paid for it because it was bad. It may be that the features of the sitter were such as to lend themselves to exaggeration by the sun, and the sun may have played a trick on the sitter, and have produced something which is an atrocious caricature of the real features. Is it to be said that the photographer is to be at liberty to sell that caricature broadcast, because he has not been paid for it owing to his own failure? That appears to me an absurd proposition.

The result is that in cases of this sort—and it must depend on the facts of each case—where the owners of schools, particularly a lady owner of a girls' school, admit a photographer to their precincts and have photographs taken according to their directions, even although it be at the solicitation of the photographer beforehand uninvited by the owner, there is a good consideration within the meaning of the Act, proceeding from the person who allows the photographer to come into his or her house, so that the photographer cannot make use of the negatives without the permission of the true owner.

In the present case the defendants justify on the titles of Mr. Price and Miss Cruse. The plaintiffs are suing as the authors of the photograph. Their title as authors has been displaced, in my judgment, by the title of the person who directed the photograph to be taken for a good consideration; and, accordingly, the action fails and must be dismissed with costs.

Solicitors: *Peacock, Fisher & Chavasse; Martin & Watkins.*

J. R. B.

WHITBY *v.* VON LUEDECKE.

BUCKLEY J.

1906

March 6, 7.

[1905 W. 2892.]

Settlement—Power of Appointment among Children—Exercise of Power—Appointment of Income to Children equally and of whole Income to Survivor for Life—Contingent Remainder—Perpetuity.

By a settlement made in 1844 on the marriage of W. and G., real estate was settled to the use of G. for her life, and after her death to the use of such children of the marriage in such shares and manner as G. should by will devise the same. The only two children of the marriage were L. (born in 1846) and A. (born in 1852). G. died in 1877, having by her will devised that the yearly income of the settled estate should be equally divided "during their respective lives between my daughters L. and A.," and that "in the event of the death of either the survivor shall receive the whole income," and that on her death the estate should be sold and the proceeds divided among the children of L. and A.:—

Held, that the gift to the survivor was a contingent and not a vested estate, and as the survivor might be a person not ascertainable within twenty-one years from the death of G., the gift was void as contravening the rule against perpetuities.

By an indenture dated July 27, 1844, and made between Ann Whitby, then Ann Gregory, of the first part, Alfred Whitby of the second part, and Breedon Everard and Thomas Everard of the third part (being a settlement on the marriage, shortly afterwards solemnized, between Ann Whitby and Alfred Whitby), Ann Whitby appointed and granted unto B. Everard and T. Everard (below called the trustees), their heirs and assigns, a farm in Thurlaston, in the county of Leicester, to hold the same to the trustees, their heirs and assigns, to the use of Ann Whitby, her heirs and assigns, until the solemnization of the said marriage, and afterwards to the use of the trustees and their heirs during the joint lives of Alfred Whitby and Ann Whitby, upon trust to pay the rents and profits to Ann Whitby for life. And after her death to the use of the only child or of all and every or such one or more of the children of Alfred Whitby on the body of Ann Whitby or of any issue of any such child or children for such estates or interests in such shares and generally in such manner as Ann Whitby, whether covert or sole, should by will or codicil devise the

BUCKLEY J. 1906 WHITBY v. VON LUEDECKE.

same; and in default of such devise, and as to so much of the premises or of the estate and interest therein as should not be completely disposed of, if there should be more than one child of the marriage, then to the use of all such children as tenants in common and of the several and respective heirs of the several and respective bodies of all such children. There were only two children of the marriage, namely Lucie Whitby, born on June 26, 1846, and Ann Jane Whitby, born on October 1, 1852.

Ann Whitby died on February 15, 1877, having left a will dated November 27, 1875 which, so far as material, was as follows: "I, Ann Whitby . . . . having by my marriage settlement possession of the estate or farm called Tyers's Farm . . . . do will and devise that the yearly income or rent of the said Tyers's Farm shall be equally divided during their respective lives between my daughters Ann Jane and Lucie or Lucy Whitby after my decease, and in the event of the death of either the survivor shall receive the whole income or rents arising from the same, and at the death of my last daughter the above farm may be sold and the proceeds divided amongst the children of the above-named Ann Jane and Lucy or Lucie Whitby, supposing they or either of them shall have married."

The two daughters were in possession of the farm, or the rents and profits thereof, from the death of their mother up to the death of Ann Jane Whitby. They were advised that the will was inoperative, and by a deed dated September 29, 1891, after reciting that Ann Whitby died without having exercised the power of appointment contained in the settlement, each of them conveyed her undivided half-share in the farm freed from the estates tail and all remainders, estates and powers to take effect after the determination, or in defeasance of such estates tail to R. B. Berridge in fee simple, to the use of Ann Jane Whitby and Lucie Whitby in fee simple, as tenants in common. This deed was duly enrolled pursuant to 3 & 4 Will. 4, c. 74. Ann Jane Whitby died a spinster on March 8, 1903, having by her will given all her real and personal estate to Johann C. A. C. Von Luedecke. After Ann Jane Whitby's death Von Luedecke and Lucie Whitby joined in letting the farm, and took the rents in equal shares, and negotiations between them took place as

to a purchase by Lucie Whitby of Von Luedecke's share of the farm.

In October, 1905, Lucie Whitby commenced an action against Von Luedecke, and in her statement of claim she alleged that in joining in the tenancy agreement and in negotiating for sale she "was acting in ignorance of her rights and in the belief that the defendant was entitled to an undivided moiety of the said property in fee simple in possession," and that she "did not become aware of her rights or that she was or might be entitled during the residue of her life to the whole of the income of the said property until the end of May, 1905, and she claimed:—(1.) a declaration that she was entitled under the settlement and will of Ann Whitby, and, in the events which had happened, to an estate for life in the entirety of the farm; and (2.) an account and payment of rents and profits received by the defendant.

The main defence was that the will of Ann Whitby was of no effect by reason of the law as to remoteness.

The action was tried on March 6 and 7, 1906.

Buckmaster, *K.C.*, and *E. P. Hewitt*, for the plaintiff. There is no doubt that the estate given under the settlement and will must vest within a life or lives in being and twenty-one years afterwards, but it will be contended that the reversionary estate for life which the survivor of the daughters was to take under their mother's will in lieu of the share for life of the daughter who died first is not within that period. We say that the surviving daughter's interest in remainder was vested at her mother's death.

Vaughan Hawkins and *Martelli*, for the defendant. The gift of the income after the death of one daughter is a contingent remainder, and as it could not vest within the legal period the gift is void for remoteness. What the plaintiff claims under is a limitation for life to a person not alive at the date of the settlement, which, of course, must be read with the will, and the person to take cannot be ascertained till one of the sisters dies. The case comes under the fourth class in Fearne on Contingent Remainders (10th ed. vol. i. p. 9), where the author says: "So

BUCKLEY J. 1906 WHITBY v. VON LUEDECKE.

if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent, for it is uncertain who will be the survivor." And for this he refers to Cro. Car. 102. (1) Here the survivor cannot be ascertained until all but one of the persons entitled have died, and until then there is a contingency existing. The gift of the entire income did not vest on the mother's death, but was only to go to a person who was not ascertainable until after a life or lives in being and twenty-one years had expired. The rule as to remoteness is none the less applicable because the limitations are legal: *In re Ashforth.* (2) In the same case Farwell J. says (3): "Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities"; and further on he says that "three void contingent remainders will not make one good vested remainder."

Thus, it is immaterial that the estate which is contingent is a life estate. "As an estate in fee, to be devised validly, must be so devised as to vest within the compass of lives in being at the testator's death, and twenty-one years after the death of the survivor of them, so I conceive must a life interest. That it is limited in its duration can, I apprehend, make no difference": per Knight Bruce V.-C. in *Boughton* v. *James.* (4) [They also referred to *Pearks* v. *Moseley* (5); *Stuart* v. *Cockerell* (6); *Lord Dungannan* v. *Smith* (7); *In re Bence.* (8)]

Buckmaster, K.C., and *E. P. Hewitt.* If the testatrix here had in words said "I give my estate to the use of my two daughters for life, and in the case of the death of either, I give her half of the income to the other," that would have been good. Here an estate for life in half the property is given to each daughter, with a remainder in that half to the other for life. That remainder is vested, and the only reason why the remainderman does not get it is that she dies before it falls in, which is always the result

(1) The case referred to is *Biggot* v. *Smyth* (1627) Cro. Car. 4th ed. 102.—F. E.
(2) [1905] 1 Ch. 535.
(3) [1905] 1 Ch. 540, 541.
(4) (1844) 1 Coll. 26, 46.
(5) (1880) 5 App. Cas. 714.
(6) (1869) L. R. 7 Eq. 363.
(7) (1846) 12 Cl. & F. 546.
(8) [1891] 3 Ch. 242.

where successive life interests are given to named persons, and are vested remainders. The word "respective" shews that each individual life takes a half of the property for life, and that the two daughters take as tenants in common: *Sutcliffe* v. *Howard*. (1)

[They also referred to *Ashley* v. *Ashley* (2); *In re Hargreaves* (3); Lewis on Perpetuity, p. 423; Williams on Real Property, 12th ed. pp. 251, 253.]

Vaughan Hawkins, in reply on the additional cases cited by the plaintiff's counsel.

BUCKLEY J. By the settlement of July 27, 1844, Ann Whitby, who was the wife of the marriage, had power by will or codicil to devise certain real estate so as to create legal limitations in favour of the children or issue of the marriage. She made a will on November 27, 1875—an informal document, not drawn, I should say, by a lawyer—and by that instrument she willed and devised that the income of this real estate should be equally divided during their respective lives between her daughters Ann and Lucy after her, the appointor's, death. Then follow these words: "And in the event of the death of either, the survivor shall receive the whole income or rents arising from the same"; and then comes a further gift on the death of the surviving daughter. The question I have to decide is whether the words "in the event of the death of either, the survivor shall receive the whole income" create a vested interest or a contingent interest. If it is a vested interest it is good; if it is a contingent interest it is bad, because it would not, or might not, vest within a life or lives in being, and twenty-one years afterwards. Of course, nothing turns on the use of the words "in the event of"—that means, of course, "when." The contingency, if there be a contingency, arises on the word "survivor." You could not tell at the time, or in fact until the event had happened, which of the two ladies would survive.

Now, in the first place it is plain that if the gift had been (reading "in the event" as "when") "when either of them

(1) (1869) 38 L. J. (Ch.) 472. (2) (1833) 6 Sim. 358.
(3) (1890) 43 Ch. D. 401.

BUCKLEY J. 1906 WHITBY v. VON LUEDECKE.

dies, the survivor shall be entitled to the fee simple," that would be contingent, because the person to take could not be ascertained till the death of one of the two. But it is said that there is a difference here because the gift is not of the fee simple, but of the life estate, because it is an estate which bears within itself the quality of coming to an end by the death of the life tenant. It is said that I ought to read the words as if they were, "And when Ann Jane dies Lucie shall take a life interest in the entirety, and when Lucie dies Ann Jane shall take a life interest in the entirety," and that those would be two good vested interests vested at the death of Ann Whitby, which might fail, of course, of being enjoyed in possession by the death of the donee before the interest fell into possession, but which were good vested estates, although they might never ripen into enjoyment.

Now it seems to me that this is impossible. Every vested interest must be one which may, not necessarily which must, vest in possession. If that be true, it is obvious that the two estates of which I have spoken are such as that one of them—you cannot say which—certainly cannot vest in possession, and none the less because it is impossible to say which of the two will fail so to vest.

There is a difference, as it seems to me, between these two things—a vested estate for life, which may fail to fall into possession by reason of the life tenant dying before the event happens which gives possession, and the gift of a contingent estate for life. What I have here is a gift under which, as I understand the language, only the survivor of the two ladies will be entitled to some estate under these words "in the event of the death of either the survivor shall receive the whole," and I could not at the mother's death have said which of the two it was. It seems to me that that was a contingency—a contingent estate. I cannot read the instrument as creating two vested estates, one of which must fail, and the other of which must take effect. I think it is a contingent estate.

That, of course, is upon the construction of the document. For the purpose of arriving at that I shut my eyes to the consequences, as by the decision in *Pearks* v. *Moseley* (1) I am bound

(1) 5 App. Cas. 714.

to do. I am bound to construe the instrument first, and, having construed it, I find it gives a contingent estate. It is a contingent estate which would not, or might not, become a vested estate within any life which was in being in 1844 and twenty-one years afterwards. The consequence is that the gift is void.

Solicitors for plaintiff: *Stow, Preston & Lyttelton, for R. B. Berridge & Sons, Leicester.*

Solicitors for defendant: *Capron & Co.*

F. E.

In re MOORE. MOORE *v.* BIGG.

[1906 M 474.]

Settled Land—Trustees for the Purposes of the Settled Land Acts—Power of Sale—Other Lands comprised in the Settlement—Lands purchased by Trustees and settled to like Uses—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 16.

M., who died in 1885, by will devised land to trustees upon trust for S. for life, then for his eldest son for life, and afterwards upon trusts corresponding to a strict settlement. He gave all his personal estate to the same trustees upon trust to invest in land, to be conveyed to them upon the same trusts as the land devised. He gave the trustees a power of sale over all the land except his mansion house and lands in the same parish.

The trustees had invested part of the personal estate in the purchase of lands which were conveyed to them upon the trusts of the will. They had afterwards sold all the lands originally comprised in the will other than those excepted from the power of sale. The equitable tenant for life had entered into a contract for the sale of the mansion house:—

Held, that the purchased lands were "comprised in the settlement, and subject to the same limitations, as the land agreed to be sold" within the meaning of the Settled Land Act, 1890, s. 16, sub-s. (i.), and the trustees were trustees for the purposes of the Settled Land Acts.

FRANK JOHN MOORE, the testator, by his will dated May 16, 1880, devised all his real estate to trustees upon trust for A. C. Streatfield for life, with remainder to his eldest son for life, with remainders over in strict settlement. The will contained a

SWINFEN EADY J.
1906
MOORE, *In re.*
MOORE *v.* BIGG.

power for the trustees to sell any part of his real estate, except his mansion house and lands situate in the parishes of Northchurch and Berkhamsted which were occupied therewith, and to invest the proceeds in the purchase of real estate to be assured to them upon the same trusts as the lands devised.

The testator gave all his personal estate to the same trustees upon trust to realize and to hold the proceeds upon the trusts therein declared of the proceeds of sale of real estate. The testator died on April 16, 1885.

All the real estate devised by the testator's will, except the mansion house and the lands in Northchurch and Berkhamsted, had been sold by the trustees, the last of such sales having taken place in July, 1905. The proceeds of these sales had not as yet been invested in land.

The trustees had at different dates, of which the latest was in 1892, invested considerable sums out of the personal estate of the testator in the purchase of lands, which had been conveyed to the trustees upon the trusts of the will.

A contract had been entered into by the second tenant for life named in the will, who had come into possession of the property, and was also one of the trustees of the will, for the sale of the mansion house and lands occupied therewith. The trustees consented to the sale, but the purchaser had raised a question whether the trustees were trustees of the mansion house for the purposes of the Settled Land Acts.

This summons was taken out under the Settled Land Act by the tenant for life for the determination of the question so raised. The other two trustees were the defendants. The question depended on the construction of the Settled Land Act, 1890, s. 16. (1)

(1) "Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,—

"(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale . . . ."

T: A. Nash, for the summons. The question depends wholly on the construction of s. 16, sub-s. (i.), of the Settled Land Act, 1890. It is admitted that the trustees have no power of sale over this property under the will, and all the land over which the will gave them a power of sale has been sold. But the new lands purchased are "comprised in the settlement," and "subject to the same limitations, as the land to be sold." The trustees have a power of sale over the newly purchased lands, and are therefore within the section.

Coote, for the defendants. The section requires two things—the land is to be "comprised in the settlement" and subject to the same limitations as the land to be sold. "Comprised" must mean originally comprised. That is the natural meaning, and if it is not used in that meaning here it would be unnecessary; the words "subject to the same limitations" would be sufficient by themselves. It would be a curious result if trustees could, by purchasing new land, give a tenant for life power to sell land which he could not sell under the will. The point is referred to in Wolstenholme's Conveyancing and Settled Land Act, 9th ed. p. 452.

H. B. Vaisey held a watching brief for the purchaser.

SWINFEN EADY J. In my opinion these trustees are trustees for the purposes of the Settled Land Acts within the meaning of s. 16, sub-s. (i.), of the Settled Land Act, 1890. There was land originally comprised in the settlement as to which there was a power of sale. The testator declared that it should be lawful for the trustees or trustee for the time being to sell or exchange all or any of the devised premises; then there is an exception as to the mansion house and certain lands and hereditaments: so that the settlement created by the will comprised land as to which there was a power of sale, and the trustees, which would include the trustees of the settlement for the time being, had a power of sale over that land. Then with regard to the residuary personalty there was a trust for conversion and "to retain and apply the clear proceeds upon the trusts and with and subject to the powers, provisoes, and declarations and in the manner hereinafter declared and directed of and concerning the money to arise

SWINFEN EADY J.

1906

MOORE, *In re.* MOORE *v.* BIGG.

from any sale of the hereditaments hereinafter devised under the power of sale thereof hereinafter contained." The money to arise from any such sale was directed to be reinvested in land to be held on the same trusts. Under these circumstances there is power to invest the residuary personalty in land, and what happened is that land has been purchased and conveyed to the trustees, and some portion remains unsold. There is a contract for the sale of the mansion house, and the question is whether the persons who are the trustees of the will are the trustees of the mansion house for the purposes of the Settled Land Acts. They are trustees of land subject to the limitations of the will with a power of sale; but the point argued is that it was not originally so subject, but was subsequently purchased, and therefore that they are not within s. 16, sub-s. (i.), of the Act. In my opinion it is impossible to give such a limited and narrow construction to the sub-section. "Comprised in" means "for the time being comprised in," and therefore the added land, purchased with a portion of the original fund, is as much "comprised in the settlement and subject to the same limitations" as the lands which belonged to the testator at the date of his death. I therefore answer the question in the affirmative.

Solicitors: *Wood, Bigg & Nash; Ernest Bevir, for A. W. Vaisey, Tring.*

J. R. B.

SWINFEN EADY J.

1906

March 16.

In re SHARP. RICKETT *v.* RICKETT.

[1906 S. 574.]

Trustee and Cestui que Trust—Annuity—Income Tax—Duty of Trustee to deduct—Liability to replace Amounts paid in excess by not deducting the Tax.

S. by will gave his real and personal estate to trustees upon trust to convert and invest, to pay certain annuities out of the income and accumulate the residue of the income until the capital became divisible (or for twenty-one years), and subject thereto to hold capital and income in trust for his grandchildren in equal shares. The trustees invested the funds in such a manner that the income tax was always deducted before the income was paid to them. The successive trustees for over twenty years paid all the annuities in full without deducting income tax. Some of the trustees were also annuitants:—

Held, that the trustees were liable to make good to the trust estate the amounts of income tax so overpaid to the annuitants.

Held, also, that s. 8 of the Trustee Act, 1888, applied, and the liability of the trustees was limited to payments made within six years, except in the case of sums retained for their own annuities.

William Sharp, the testator, by his will dated September 1, 1869, gave all his real and personal estate to trustees upon trust for sale and conversion and investment as therein mentioned, and with and out of the income, but not out of the capital of the trust funds, to pay an annuity of 500*l.* to his wife during widowhood and annuities of 400*l.* each to his three daughters, Sarah Sharp, Ann Sharp, and Eliza Sharp, and his daughter-in-law Maria Louisa Perkins Sharp during their respective lives. And he directed that the surplus income should be accumulated until the capital should be divisible (but not for more than twenty-one years), and such accumulations should be held upon the same trusts as the capital of the trust funds. He directed that the surplus income not required for answering the said annuities after the expiration of twenty-one years from his death should be held upon the same trusts as the capital of the said trust funds, and he directed that subject to the trusts aforesaid the capital and income of the said trust funds should be held in

SWINFEN EADY J.
1906
SHARP, *In re.* RICKETT *v.* RICKETT.

trust for all his grandchildren in equal shares, and he appointed his wife Eleanor Sharp, William Richard Rickett, and John Blount Price executors and trustees of his will. The testator made two codicils to his will, and thereby appointed William Drummond trustee in the place of J. B. Price and increased his wife's annuity to 700*l.*, but made no other alterations affecting the subject of this report. The will was proved by the testator's widow, William Richard Rickett, and William Drummond. The widow died in 1882, and the testator's daughter Sarah Sharp and J. C. Rickett were appointed trustees in her place. William Drummond died in 1884. Sarah Sharp died on April 4, 1901, and Hubert Cecil Rickett was appointed trustee in her place. In July, 1902, J. C. Rickett retired from the trust and A. N. Rickett was appointed in his place.

The trust funds were invested by the trustees in stocks or other securities, from the income of which income tax was deducted before it was paid to the trustees. Notwithstanding this, the successive trustees had paid the various annuities in full without deducting income tax.

This summons was taken out on February 13, 1906, by H. C. Rickett and A. N. Rickett, the present trustees of the will, for the determination of the questions whether it was the duty of the trustees for the time being of the will to have deducted income tax from the annuities before paying them; whether, if this was their duty, they or their estates were liable to make good to the estate the loss occasioned by reason of such deductions not having been made; and whether such deductions should be made for the future. The defendants were W. R. Rickett (the original trustee), Eliza Sharp, the only surviving daughter of the testator, and his daughter-in-law Maria Louisa Perkins Sharp, the legal personal representatives of the deceased trustees, and some of the testator's grandchildren. All the annuitants except Eliza Sharp and M. L. P. Sharp were dead at the date of the summons.

J. W. F. Beaumont, for the summons.

Edward Beaumont, for the grandchildren. It is quite clear that when an annuity is given by deed or will without express

words directing it to be paid free of income tax, the annuitant must bear the tax: *Abadam* v. *Abadam* (1); *Warren* v. *Warren.* (2) The trustees have in fact paid the annuitants additional annuities equal to the amount of the tax from time to time, and they have done this out of the income belonging to the other cestuis que trust. Of course, they must make good the loss.

[He referred to the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40, and the Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15).]

Marigold, for the defendants, W. R. Rickett and the executors of the deceased trustees. The power to deduct income tax from an annuity depends in the first instance on s. 102 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and that has been held in *Clerical, Medical, and General Life Assurance Society* v. *Carter* (3) not to be a charging section. No duty to deduct it is thrown on the trustees. The cases quoted only decide that the annuitant must pay the tax, not that the trustees must deduct it. *Warren* v. *Warren* (2) and *In re Horne* (4) shew that the excess of past payments without deduction cannot be deducted from subsequent payments. It was never suggested in either of these cases that the omission to deduct was a breach of trust. In any case s. 8 of the Trustee Act, 1888, applies, and the claim must be limited to six years' arrears, except in the cases where a trustee retained her own annuity.

SWINFEN EADY J. Upon the construction of this will it is quite clear the income tax ought to have been deducted, and I so decide. The annuities were not given free of tax, and there were no words from which it could be fairly inferred that a sum equal to the tax was also given to the annuitants. The result is that the income tax should have been deducted, and it was a breach of trust to pay to the annuitants so much of the amount that they received as should have been reserved and accumulated. It was a breach of trust, but still an honest breach of trust: a breach of trust in good faith and an innocent one, but still one for which the trustees are legally liable.

(1) (1864) 33 Beav. 475.
(2) (1895) 72 L. T. 628; 43 W. R. 490.
(3) (1888) 21 Q. B. D. 339.
(4) [1905] 1 Ch. 76.

SWINFEN EADY J.
1906
SHARP, *In re.* RICKETT *v.* RICKETT.

As regards the sums paid away more than six years ago, they are barred by the Trustee Act, 1888, which enables the trustees to plead the Statutes of Limitation to these claims. That does not apply to any sum retained by the trustees in respect of their own annuities. The widow and Sarah Sharp were both trustees and annuitants, and cannot rely on any Statute of Limitations in respect of moneys retained by themselves. There will be a declaration that the tax from the annuities should have been deducted. The result is that the defendant William Richard Rickett will be liable for six years; Sarah Sharp died in 1901, so that her estate will be liable for one year, and also for the amount that she retained for herself without reference to the date when it was retained. The widow's estate will be liable, so far as it remains unadministered, for what she retained.

Solicitors: *Beaumont & Son.*

J. R. B.

SWINFEN EADY J.
1906
March 23.

GRIFFITHS *v.* VEZEY.

[1905 G. 385.]

Practice—Vendor and Purchaser—Judgment for Specific Performance against Purchaser—Default in Payment by Purchaser—Forfeiture of Deposit—Form of Order.

Where judgment for specific performance of a contract for purchase of land has been given against the purchaser, and he fails to comply with the judgment, the vendor is entitled, if the contract contained a clause forfeiting the deposit, and giving the vendor power to proceed to a fresh sale, to an order declaring the deposit forfeited and for payment of any deficiency on a fresh sale and costs instead of the usual order rescinding the contract.

On September 22, 1904, the plaintiffs, who were trustees of a will with power of sale, entered into a contract with the defendant for the sale of a house for 2400*l.* A deposit of 125*l.* was paid. The contract incorporated conditions, under which the property had been put up for sale, which included a condition, in the usual form, that if default was made by the purchaser the deposit should be forfeited, the vendors might proceed to a fresh sale, and any deficiency in the price obtained on such sale

should be made good by the purchaser. The purchaser failed to complete the purchase. The vendors brought an action for specific performance, and on June 28, 1905, judgment was given for the plaintiffs in the usual form directing the amount of purchase-money, interest, and costs to be computed, an account to be taken of rents and profits received by the vendors, that the latter should be deducted from the former, the balance certified, and that on payment of the balance the plaintiffs should convey the property to the defendants. On August 7, 1905, the Master made his certificate, finding that the taxed costs of the action were 75*l.* 2*s.* 4*d.*, and the balance due from the defendant, including the costs, was 2424*l.* 8*s.* 9*d.* The defendant made no attempt to pay the balance.

On November 17, 1905, an order was made, on the motion of the plaintiffs, fixing a time and place for payment of the balance and ordering the defendant to pay the balance at that time and place, and the defendant was ordered to pay the costs of the motion. The defendant did not appear at the appointed place. The plaintiffs now moved that it might be declared that the deposit was forfeited to the plaintiffs, and that they were at liberty to proceed to another sale, according to the contract, that immediately after such sale the deficiency (if any) of the price obtained, together with all expenses of such sale, should be paid by the defendant to the plaintiffs, and he should be ordered to pay to the plaintiffs the 75*l.* 2*s.* 4*d.* costs included in the Master's certificate and 25*l.* 10*s.*, the plaintiffs' taxed costs of the motion of November 17, 1905, and the costs of this motion.

Eve, K.C., and *T. L. Wilkinson*, for the plaintiffs. The most usual order, under circumstances like the present, is for rescission of the contract. But if the contract is rescinded the plaintiffs would have no right to retain the deposit: *Jackson* v. *De Kadich*. (1) We submit that the plaintiffs are entitled, both under the terms of the contract and by the general law, to retain the deposit, and therefore the order should be in the terms asked by the motion.

The defendant did not appear.

(1) [1904] W. N. 168.

SWINFEN EADY J.
1906
GRIFFITHS v. VEZEY.

SWINFEN EADY J. I cannot make a fresh order for the payment of the costs of the motion of November 17, 1905, since taxed at 25*l.* 10*s.*, for there is already an order for their payment. In other respects the order may go according to the notice of motion. The defendant must pay the costs of this motion. All proceedings must be stayed except such as are necessary for enforcing the payment of and recovering the costs directed to be taxed by the order of November 17, 1905, and since taxed at 25*l.* 10*s.*, and for carrying this order into effect.

The form of order drawn up was as follows:—

This Court doth declare that in pursuance of the conditions of sale mentioned in the said agreement, the defendant's deposit-money of 125*l.* has been forfeited to the plaintiffs, and that plaintiffs are at liberty to proceed to another sale of the property comprised in the said agreement, either by public auction or private contract, with or without notice to the defendant.

And it is ordered that, in case the said property be sold for less than the sum of 2400*l.*, the defendant do immediately after such sale pay to the plaintiffs the difference (if any) between the said sum of 2400*l.* and the amount at which the said property shall be resold in case the said property shall be resold for less than the said sum of 2400*l.*, together with the expenses of such sale: And it is ordered that in the event of the defendant not making such payment to the plaintiffs after such sale, the plaintiffs do recover against the defendant the said sum of 2400*l.* or such difference and the said expenses by way of liquidated damages: And it is ordered that the defendant do pay to the plaintiffs the sum of 75*l.* 2*s.* 4*d.*, the amount of their costs of this action taxed pursuant to the said judgment: And it is ordered that the defendant do pay to the plaintiffs their costs on this motion to be taxed by the taxing Master: And it is ordered that all further proceedings in this action, except for the purpose of enforcing payment of or recovering the costs by the said order dated November 17, 1905, directed to be paid by the defendant to the plaintiffs and since taxed at 25*l.* 10*s.*, and for the purpose of carrying this order into effect, be stayed, and for such purpose the plaintiffs are to be at liberty to apply as there may be occasion.

Solicitors: *Dubois & Co.*

J. R. B.

In re SMITH. SMITH *v.* DODSWORTH.

SWINFEN EADY J.

1906

March 30.

[1906 S. 400.]

Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Public-house—Licence—Compensation for Non-renewal—Charge for Compensation Fund—Deductions from Rent—Tenant for Life and Remainderman—Annuitant.*

The deductions which, under the Licensing Act, 1904, a licence-holder is allowed to make from his rent in respect of charges imposed by quarter sessions to form a compensation fund for non-renewal of licences under that Act are a charge upon the rent. In cases where the reversion is settled, a tenant for life has no right, in the absence of special directions in the will or settlement, to have any part of these deductions paid out of capital.

John Francis Smith, the testator, by his will appointed his wife and two others trustees, and, after giving certain specific and pecuniary legacies, devised and bequeathed all the rest of his personal estate and all his real estate to his trustees upon trust out of the income of his trust estate to pay to his wife, or permit her to retain during her widowhood, the annuity or yearly sum of 200*l.* He directed the residue of the income of his trust estate to be accumulated for the purpose of reducing incumbrances on his real estate, and after the death or second marriage of his widow he directed all his trust estate to be held in trust for his three unmarried daughters.

The testator died on March 11, 1896.

His real estate comprised three freehold beer-houses, known as the Clarence Inn, let on lease at 35*l.* a year; the South Myton Tavern, let on lease at 55*l.* a year; and the Drum Inn, let on lease at 35*l.* a year. The quarter sessions had imposed on these beer-houses certain charges under the provisions of the Licensing Act, 1904, s. 3 (1), for the purpose of forming a compensation

(1) Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3:

"(1.) Quarter sessions shall, in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences

SWINFEN EADY J.

1906

SMITH, *In re.* SMITH *v.* DODSWORTH.

fund, and the tenants had, in pursuance of that section and of Sched. II. to the Act, deducted from their rents for the year 1905 the sums following: From the rent of the Clarence Inn, 7*l.* 12*s.*; from the rent of the South Myton Tavern, 11*l.* 8*s.*; and from the rent of the Drum Inn, 4*l.* 18*s.* 4*d.* It was admitted that these deductions were correct.

The income of the estate at the time of the testator's death had been sufficient to pay the widow's annuity, but it had fallen off, and these deductions made it insufficient for that purpose. The widow was therefore receiving the whole income.

This summons was taken out by the widow for the determination of the question, among others, whether the amounts deducted from the rents by the lessees of the said beer-houses as aforesaid on account of the said charges payable under the Licensing Act, 1904, ought to be raised wholly or in part out of the capital of the testator's estate by way of exoneration of the income thereof.

T. A. Nash, for the summons. These payments are really made by way of insurance of the beer-houses against the risk of non-renewal of licences. The widow is in the position of a tenant for life, for her annuity exhausts the income. A tenant for life is not bound to insure, but only to pay ordinary current outgoings like rates and taxes. He will be allowed special payments made for the preservation of the property: *Dent* v. *Dent* (1); or the

---

renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shewn in the scale of maximum charges set out in the First Schedule to this Act.

"(2.) Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence, but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions in accordance with rules made by the Treasury for the purpose.

"(3.) Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge."

(1) (1862) 30 Beav. 363.

expenses of constructing drains and doing repairs required by statute: *In re Barney* (1); *In re Farnham's Settlement.* (2)

The benefit of the insurance all goes to the capital value; the tenant for life may never get any advantage. If the money is raised by a mortgage or charge the tenant for life will bear her share by the reduction of her income.

Martelli, for the trustees of the will and two of the daughters. The widow is not strictly in the position of a tenant for life. She is only entitled to be paid her annuity out of income. She now argues that that means not only the income actually received, but that with something added, which is to be raised out of capital. The charge under the Act is to be levied every year. It is an annual recurring charge, and might easily exhaust the whole capital if raised by mortgage every year. The income is compulsorily reduced by the Act, which provides how the payment is to be made. The analogy of insurance does not hold; it does not follow because a tenant for life is not bound to insure that he ought not to pay the premiums on a compulsory insurance required by law. *Dent* v. *Dent* (3) was a case of salvage. *In re Barney* (1) and *In re Farnham's Settlement* (2) were cases in which trustees were compelled to make improvements in the capital value.

Galbraith, for the other daughter. This is not a case of insurance, for many people share in the benefit besides the remaindermen. *In re Crawley* (4) shews that where, as here, an Act of Parliament directs a charge to be paid out of rent the Court will not interfere.

T. A. Nash, in reply, referred to *In re Morley.* (5)

SWINFEN EADY J. (after stating the provisions of the will as above). Now it will be observed that the trustees are to pay the yearly sum out of the income of the trust estate. It appears that a portion of the property consists of three freehold beer-houses with on licences, and, under the provisions of the Licensing Act, 1904, charges have been imposed, the proper proportion of which,

(1) [1894] 3 Ch. 562.
(2) [1904] 2 Ch. 561.
(3) 30 Beav. 363.
(4) (1885) 28 Ch. D. 431.
(5) [1895] 2 Ch. 738.

SWINFEN EADY J.
1906
SMITH, *In re.*
SMITH *v.* DODSWORTH.

according to the statute, has been deducted by the tenants of the beer-shops, who hold the licences, from their rents. The question is whether the whole of those deductions are to be borne by the income, with the result that there will not be sufficient income left to pay the widow her annuity, or whether she is entitled to throw the whole or some part of the deductions on the capital and to have them, or some part of them, raised out of capital and paid to her.

It is clear, I think, on the construction of the will, if the matter depended on that alone, that all the widow is entitled to is an annuity of 200*l.* out of the income of the trust estate. Her counsel was right in declining to argue that the annuity was charged on the capital. The income of the trust estate has by the operation of the Act of 1904 been reduced by the amounts deducted by the tenants from their rents, and has thus become insufficient to pay the widow's annuity in full. But there is no provision in the will for making good any loss out of capital, or for augmenting the income by moneys raised out of capital. There is nothing within the four corners of the will to enable the widow to throw any part of the charge on the capital. So if the application is to succeed it must be by reason of something to be found in the Act or in the general rules of law applicable to the case.

The Act of 1904 supports the contention that this charge ought to be borne by the persons entitled to the income. After providing by s. 3, sub-s. 1, that quarter sessions shall in each year impose these charges for the purposes of the Act unless they certify that it is unnecessary to do so in any year, it enacts by sub-s. 2 that the charges shall be levied and paid together with and as part of the duties in the corresponding excise licence. So the result is that the tenant has to pay them together with the ordinary excise duty, and if he does not so pay them he will not obtain an excise licence. Then sub-s. 3 provides that such deductions from rent as are set out in the schedule may be made by any licence-holder who pays a charge under s. 3, and also by any person from whose rent such a deduction is made. The result is that a proportion of the charge, varying with the length of the tenancy, may be deducted by the licence-holder from his rent, and if his landlord is himself a lessee, he

also may make a deduction, so that the burden of the sums deducted is to fall upon the person ultimately receiving rent from the premises. The charges go to form a fund out of which compensation is to be paid in cases where licences are not renewed. The Act contains no provision by which any part of the charge can be thrown upon capital.

Then when I consider the nature of the charge, it is much more like a charge on income than a charge on capital. It is an annual charge, coupled with and to be paid as part of the excise duty on licences, which is an annual payment. It seems to me to bear no analogy to cases where money has been paid for salvage of property or for permanent improvements. Even if the argument that it is to be regarded as a premium for insurance be well founded, it is much more proper to regard such a payment as an annual outgoing than as a charge to be raised and paid out of capital. None of the authorities which have been cited afford much assistance on the point, except *In re Crawley* (1), and I think that the statute here, as in that case, has expressly provided the manner in which the charge is to be borne. I can find nothing in the will, or the Act or the general law, to relieve the widow from bearing this charge, or to entitle her to have the income of the trust fund notionally increased by treating as part of it these sums which were deducted from the rents before they were paid and raising the deductions out of capital. I therefore decide that the widow is not entitled to have any part of this annual charge raised and paid out of capital.

Solicitors: *Rollit, Sons & Burroughs, agents for Thompson, Cook & Babington, Hull; H. Davey Turner.*

(1) 28 Ch. D. 431.

J. R. B.

SWINFEN EADY J.

1906

April 4.

WILLIAMS *v.* MORGAN.

[1906 W. 25.]

Mortgage—Foreclosure—Principal not due—Covenant to pay Interest half-yearly—Temporary Default—Conditions of Proviso for Redemption—Construction.

A mortgage of January 30, 1900, contained the following provisions:—

1. A covenant to pay the principal on January 1, 1914, "with interest that may be then due" at a specified rate.

2. A covenant to pay interim interest half-yearly on specified days.

3. A conveyance of the property "subject to the proviso for redemption hereinafter contained."

4. A proviso that the mortgagee would not call in the principal before January 1, 1914, if the half-yearly interest were paid on the specified days or within twenty-one days thereof.

5. A proviso that the mortgagor should not pay off the principal before January 1, 1914.

6. A proviso that if the mortgagor should on January 1, 1914, pay the principal, "with interest for the same in the meantime at the rate aforesaid that may be due and unpaid," the mortgagee would reconvey.

The mortgagor having paid an instalment of interest twenty-seven days after the specified day, the mortgagee sued for foreclosure:—

Held, on the construction of the deed, that the proviso for redemption did not import a condition that interest was to be paid half-yearly on the specified days or within twenty-one days thereof, and, consequently, that as there was no condition broken, the mortgagee's estate was not absolute at law, and there could be no foreclosure.

In re Turner, (1895) 43 W. R. 153; 13 R. 132, followed.

Edwards v. *Martin*, (1856) 25 L. J. (Ch.) 284; *Burrowes* v. *Molloy*, (1845) 2 J. & Lat. 521, 526; and *Stanhope* v. *Manners*, (1763) 2 Eden, 197, distinguished.

ORIGINATING SUMMONS.

By a mortgage dated January 30, 1900, and made between the defendant, thereinafter called the mortgagor, of the one part, and the plaintiff's predecessor in title, thereinafter called the mortgagee, of the other part, it was witnessed that in consideration of the sum of 10,000*l.* paid to the mortgagor by the mortgagee "the mortgagor doth hereby covenant with the mortgagee . . . . that he the mortgagor . . . . will on January 1, 1914, pay to the

mortgagee . . . . the sum of 10,000*l.*, with interest that may be then due for the same at the rate of 5*l.* per cent. per annum, and will hereafter from the date hereof, so long as the said sum of 10,000*l.* or any part thereof shall remain unpaid, pay to him . . . . interest for the same at the rate aforesaid by equal half-yearly payments on January 1 and July 1 in every year." These covenants are hereinafter referred to as the first and second covenants.

The mortgagor then conveyed certain hereditaments to the mortgagee "subject to the proviso for redemption hereinafter contained."

The mortgage proceeded as follows:—

"Provided always, and it is hereby agreed, that if the mortgagor . . . . shall on every half-yearly day on which the interest is hereinbefore made payable under this security until January 1, 1914, or within twenty-one days after each of such days respectively, pay to the said mortgagee . . . . interest for the principal sum for the time being owing to him . . . . at the rate aforesaid, then the said mortgagee . . . . shall not before the said January 1, 1914, call in the said sum of 10,000*l.* or any part thereof.

"Provided always, and it is hereby agreed, that the said mortgagor . . . . shall not be entitled to pay off the said sum of 10,000*l.* or any part thereof before January 1, 1914.

"Provided always, and it is hereby agreed and declared, that if the said mortgagor . . . . shall on January 1, 1914, pay to the mortgagee . . . . the said sum of 10,000*l.*, with interest for the same in the meantime at the rate aforesaid that may be due and unpaid, the mortgagee . . . . shall at any time thereafter upon the request and at the cost of the mortgagor . . . . reconvey . . . . the said premises . . . . to the mortgagor. . . . ."

There was no express power of sale.

By a deed of October 27, 1900, between the same parties the interest was made payable quarterly on January 1, April 1, July 1, and October 1 in each year. On July 26, 1905, the quarter's interest due July 1 being unpaid, the plaintiff gave notice calling in the mortgage money. On July 28 the mortgagor

SWINFEN EADY J.
1906
WILLIAMS v. MORGAN.

paid the interest, and the subsequent instalments were regularly paid.

On January 3, 1906, the plaintiff issued this summons for foreclosure.

W. H. Gover, for the plaintiff. The proviso for redemption, read with the previous clauses, imports a condition that interest is to be paid half-yearly on the specified days, pursuant to the second covenant, or within twenty-one days thereof, according to the first proviso. This construction gives a conceivable meaning to the first proviso. This condition is broken and the mortgagee's estate is absolute at law. The plaintiff can therefore foreclose although the principal is not yet payable: *Edwards* v. *Martin* (1); *Burrowes* v. *Molloy* (2); *Stanhope* v. *Manners* (3); Coote on Mortgages, 7th ed. p. 1022.

An alternative construction would be to read the first covenant and first proviso together, with the implication that if the interest is not regularly paid the principal may be called in at once. It is clear that a slip has been made. The first covenant should have made the principal payable six months after date. The first construction is, however, more in accordance with the language of the deed, and I am therefore only asking for foreclosure, and not payment.

A strict construction of every clause gives no intelligible meaning to the first proviso, and one or other of the above constructions should be adopted.

The subsequent receipt of interest was no waiver of the condition broken: *Keene* v. *Biscoe* (4); *Leeds and Hanley Theatre of Varieties* v. *Broadbent*. (5)

Martelli, for the mortgagor. There is no room for foreclosure until the legal right to redeem has come to an end, and the mortgagee's estate is absolute at law: *Bonham* v. *Newcomb*. (6) In the present case there is no condition broken, and the legal proviso for redemption is still subsisting. The second proviso is consistent with the first covenant as it stands, and the slip (if

(1) 25 L. J. (Ch.) 284.
(2) 2 J. & Lat. 521, 526.
(3) 2 Eden, 197. See also *Seaton* v. *Twyford*, (1870) L. R. 11 Eq. 591, 598.
(4) (1878) 8 Ch. D. 201.
(5) [1898] 1 Ch. 343.
(6) (1684) 1 Vern. 232.

any) is in the first proviso, which was probably included per incuriam.

The covenant to pay interest half-yearly cannot be imported into the proviso for redemption: *In re Turner.* (1)

W. H. Gover, in reply. In that case there was nothing corresponding to the first proviso. Here the three provisoes all have reference to redemption, and should really be read together as one compound proviso for redemption.

SWINFEN EADY J. (after reading the mortgage). With reference to the covenants for payment of principal and interest, it will be observed that there is first a covenant to pay the principal and interest then due on January 1, 1914; and, secondly, a separate covenant to pay interim interest half-yearly. The subsequent alteration of half-yearly to quarterly interest is immaterial.

Now the proviso for redemption only imports the first covenant. It is conditional on the mortgagor paying on January 1, 1914, "the said sum of 10,000*l.*, with interest for the same in the meantime at the rate aforesaid that may be due and unpaid," and there is no condition as to his paying the interim interest half-yearly.

The mortgagor made default in payment of interest, but it was subsequently paid, and no interest was in arrear at the date of the summons or after. The plaintiff nevertheless asks for foreclosure.

The first question I have to determine is whether any condition of the proviso for redemption has been broken, because until the mortgagee's estate has become absolute at law there can be no foreclosure in equity. That depends on the tenor of the deed. It is in form an absolute conveyance with a conditional proviso for redemption. I have therefore to see whether any condition has been broken so that the estate has become absolute at law, and foreclosure proceedings are available.

Having regard to the terms of the proviso for redemption no condition is broken, because January 1, 1914, has not yet arrived.

It is contended that I must have regard to the first proviso,

(1) 43 W. R. 153; 13 R. 132.

SWINFEN EADY J.
1906
WILLIAMS v. MORGAN.

that if the half-yearly interest is regularly paid the mortgagee will not call in the principal till January 1, 1914. But as the only covenant to pay the principal is a covenant to pay it on January 1, 1914, and that covenant is absolutely clear in its terms, the proviso that the mortgagee will not call in the principal till then if the interest is regularly paid does not enable me to import a covenant to pay the principal at an earlier date if interest is in default. I cannot, therefore, import the condition of the first proviso into the proviso for redemption.

It is then contended that I ought to import the second covenant to pay the interest half-yearly on January 1 and July 1, and read the proviso for redemption as declaring that if the mortgagor shall on January 1, 1914, pay the principal with interest for the same in the meantime that may be due and unpaid, and shall in the meantime pay interest for the same by equal half-yearly payments on January 1 and July 1 in every year pursuant to the second covenant, the mortgagee will reconvey. But I see no ground for importing those words into the proviso for redemption, which is perfectly clear as it stands.

It is contended that I must read the instrument as a whole, and in order to give an intelligible meaning to the first proviso I must read the first covenant as if a slip had been made and it was really a covenant to pay the principal at an earlier date, e.g., six months from the date of the deed. As a matter of construction I am unable to do this. There is no action to rectify, and I am by no means satisfied that a mistake has been made. The second proviso is unconditional, and provides that the mortgagor shall not pay off the principal till January 1, 1914.

The plaintiff relied on *Edwards* v. *Martin* (1), *Burrowes* v. *Molloy* (2), and *Stanhope* v. *Manners*. (3) But in *Edwards* v. *Martin* (1) there was a condition broken, so that the mortgagee's estate was absolute at law, and the right to foreclosure had arisen. Of course, if there is a covenant to pay the principal at a future date and a covenant to pay interest half-yearly in the meantime and the proviso for redemption is conditional on the

(1) 25 L. J. (Ch.) 284. (2) 2 J. & Lat. 521, 526.
(3) 2 Eden, 197.

performance of both covenants, the condition is broken if the interest is not paid.

If the condition is broken in whole or in part the mortgagee's estate is absolute at law, and foreclosure lies. It is then immaterial whether the time for paying the principal has arrived or not.

This is what Sugden L.C. was referring to in *Burrowes* v. *Molloy* (1), where he says: "Supposing that the principal sum had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the meantime, and that, before the day of payment of the principal money, default had been made in the payment of the interest thereon, the mortgagee would, at any time after that event, have had a right to file his bill for a foreclosure; because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled." The passage is cited in argument in *Edwards* v. *Martin* (2), but a reference to the full report of *Burrowes* v. *Molloy* (1) makes the meaning absolutely clear. *Stanhope* v. *Manners* (3) falls under the same head, viz., condition broken.

In re Turner (4), relied on by the defendant, is singularly in point, and the mortgage in that case closely resembles the present mortgage. A reversionary share of funds in Court representing realty and personalty was mortgaged subject to a proviso that if the mortgagor should on or before the death of the life tenant pay the principal, "with interest for the same in the meantime" at the specified rate, the mortgagees would reconvey. Then followed two distinct covenants, one for payment of the principal on the death of the life tenant, the other for payment of interest in the meantime half-yearly at the specified rate. The proviso did not refer to the covenants. At the life tenant's death in January, 1894, the interest was thirteen years in arrear, and the question was whether the mortgagees were entitled to all the arrears, or only to six years' arrears. That depended on when their right to foreclose first arose. Chitty J. held that the point was concluded by the terms of the mortgage deed

(1) 2 J. & Lat. 521, 526.
(2) 25 L. J. (Ch.) 284.
(3) 2 Eden, 197.
(4) 43 W. R. 153; 13 R. 132.

SWINFEN EADY J.
1906
WILLIAMS v. MORGAN.

itself, and that the mortgagees were entitled to all the arrears. He says (1): "The proviso for redemption does not refer to the covenants. It is a distinct contract, and there is no ground for importing into it the covenant for payment of interest. Now, on the proviso for redemption two things are clear: first, that within the express terms of that contract the mortgagor was entitled to redeem at any time before the death of the tenant for life on payment of the principal sums, with interest in the meantime"—here the mortgagor can redeem on January 1, 1914, on payment of the principal, with interest for the same in the meantime that may be due and unpaid—"secondly, that the mortgagees were not entitled to institute any action to enforce by foreclosure or otherwise their mortgage charge before the death of the tenant for life. This is the effect of the express bargain between the parties. Default in payment of interest under the covenant would not have entitled the mortgagees to enforce their security." That applies exactly to the present case. Further on in the judgment Chitty J. says: "I am asked to import the covenant for payment of interest into the proviso for redemption for the purpose of making the interest in arrear; this, I think, would be to alter the express contract of the parties in relation to the charge." There, as in the present case, the interest was payable half-yearly. The plaintiff here makes a similar request, and asks me to import the covenant to pay the interest half-yearly into the proviso for redemption, so that on breach of that covenant the condition of the proviso is broken and the estate is absolute at law. I see no ground for doing this. It would be contrary to the tenor of the instrument and would "alter the express contract of the parties in relation to the charge." The bargain between the parties is contained in the mortgage, and there can be no foreclosure before January 1, 1914. On that date the plaintiff will be bound to reconvey on receiving the principal and interest then due. The result is that the summons fails and must be dismissed with costs.

Solicitors: *Helder, Roberts & Co., for G. F. Forsdike, Cardiff; Gibson & Weldon, for Jenkin L. Phillips, Pontypridd.*

(1) 43 W. R. 154.

G. R. A.

ATTORNEY-GENERAL *v.* MERSEY RAILWAY COMPANY.

WARRINGTON J.

1906

March 7, 8.

[1905 A. 1836.]

Railway Company—Omnibus Business—Passengers—Incidental Powers—Ultra Vires.

Railway companies, unless specially authorized to do so, have no power to carry on business as omnibus proprietors for the purpose of distributing and collecting their passengers. Such a business is not incidental to their undertaking.

London County Council v. *Attorney-General*, [1902] A. C. 165, applied.

THIS was an action by the Attorney-General at the relation of the corporation of Birkenhead for an injunction to restrain the Mersey Railway Company from carrying on business at Birkenhead as omnibus proprietors. The corporation were holders of ordinary stock and of debenture stock of the defendant company, and owned and worked a system of electric tramways in the borough of Birkenhead and the adjoining district. The Mersey Railway Company were the owners of a line of railway connecting Liverpool and Birkenhead by means of a tunnel under the river Mersey. After passing beneath the river the railway ran into Hamilton Station in Birkenhead, and then divided into two branches, one of which went north-west to Park Station and the other south-east to Central Station, and then south to Green Lane and Rock Ferry Stations. All these stations were within the borough of Birkenhead. The greater part of the business of the company consisted in the carriage of passengers between Liverpool and Birkenhead. Persons who earned their living in Liverpool and resided in or about the higher ground on the west side of Birkenhead were in the habit of using the railway daily.

In the autumn of 1905 the defendants applied to the corporation, as the licensing authority under the Birkenhead Corporation Act, 1881, and the Towns Police Clauses Acts, 1847 and 1889, to license six motor omnibuses to ply for hire as hackney carriages within the borough. The licences were duly granted

WARRINGTON J.
1906
ATTORNEY-GENERAL v. MERSEY RAILWAY.

by the corporation without prejudice to their right to take any other steps in the matter. On December 11, 1905, the defendant company instituted, and had since maintained, a service of motor omnibuses for passengers, running every six minutes between Central Station and the west end of Birkenhead. By the licences the defendants were bound to carry any passenger as long as there was room for him in the omnibus, whether he was going to or from a station or not. Accordingly they not only conveyed passengers the whole journey, but also carried on an ordinary pick-up traffic, picking up and setting down passengers at other places at different fares without taking them to or from the railway. The route taken by these omnibuses was parallel to two routes of the corporation's tram lines, and the competition was injurious to the interests of the ratepayers. The defendants also occasionally ran their omnibuses for excursions on Sundays to other places beyond Birkenhead, and were alleged to contemplate an extension of their existing service, and an application to Parliament during the present year for powers to run omnibuses.

The corporation brought this action for a declaration that the business of omnibus proprietors was beyond the powers of the railway company, and an injunction to restrain them from carrying it on; a declaration that it was ultra vires of the railway company to spend their money in this way, and an injunction to restrain them from doing so; and damages.

The defendants admitted that they had no special powers enabling them to run omnibuses, and they contended that no such powers were necessary, inasmuch as what they were doing was incidental to their undertaking, and had always been a recognized part of the business of railway companies.

Cripps, K.C., and *Leslie Scott*, for the corporation. The defendants have no power to act as omnibus proprietors. Such a business is not incidental to the undertaking of a railway, and it is not customary. This is shewn by the fact that several railway companies have obtained powers from Parliament to run omnibuses—for instance, the Great Eastern Railway Act of 1904 (4 Edw. 7, c. cviii.), s. 41, and the North Eastern Railway Act of 1905 (5 Edw. 7, c. cci.), ss. 55, 56, 57. The defendants are

themselves promoting a Bill in which they apply to Parliament for similar powers. It has been decided that tramway companies cannot carry on the business of omnibus proprietors: *London County Council* v. *Attorney-General.* (1) That decision is equally applicable to railways. The Mersey Railway Company have no special powers enabling them to keep omnibuses.

[They were stopped by the Court.]

Neville, K.C., Norton, K.C., and *A. B. Shaw,* for the defendants. An omnibus business is incidental to the undertaking of a railway company; therefore special powers are not necessary to enable us to do this. *London County Council* v. *Attorney-General* (1) was not decided on the ground that the business was not incidental, but because by their Act the county council were forbidden to carry it on. There were two businesses. They had only bought the tramway business, and it had nothing to do with the omnibus business. Further, there is a great distinction between tramways and railways. A railway is intended to carry traffic from one town to another. Tramways are only substitutes for omnibuses which run along the streets and carry passengers from one part of a town to another. If a tramway was authorized to run from one town to another, the distribution and collection of passengers at either end might be incidental to its undertaking. But in ordinary cases running an auxiliary line of omnibuses could not be incidental to a tramway. The legislation on the subject of railways is entirely distinct from that applicable to tramways.

The doctrine of ultra vires must be applied reasonably: *Attorney-General* v. *Great Eastern Ry. Co.* (2) Railways were originally intended to be owners of their lines and to take tolls for the use of them; but they have become carriers. They have always collected and distributed goods off their lines as well as on their lines, and that has been regarded as a legitimate custom. The same thing has been done with passengers, though not to the same extent. It makes no difference whether a railway company subsidizes or owns omnibuses; the question is whether they are authorized to spend money on omnibuses. That distributing passengers was the common practice of railways

(1) [1902] A. C. 165. (2) (1880) 5 App. Cas. 473, 478.

WARRINGTON J.
1906
ATTORNEY-GENERAL v. MERSEY RAILWAY.

a long time ago is shewn by the judgment of Willes J. in *South Wales Ry. Co.* v. *Redmond.* (1) The growth of the custom of distributing goods without any special powers is traced in *Hall & Co.* v. *London, Brighton and South Coast Ry. Co.* (2); *Baxendale* v. *London and South Western Ry. Co.* (3); *Attorney-General* v. *Manchester Corporation.* (4) Nothing turns on the pick-up traffic in the case, for if we are entitled to run omnibuses we are entitled to use them to the best advantage: *London and North Western Ry. Co.* v. *Price and Son* (5); *Attorney-General* v. *Great Eastern Ry. Co.* (6); *Forrest* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (7) There is no distinction in principle between the carriage of passengers and the carriage of goods. The reasoning in *Sowerby* v. *Great Northern Ry. Co.* (8) applies to both.

Cripps, K.C., in reply. This question is covered by *London County Council* v. *Attorney-General* (9), in which the judgment of Cozens-Hardy J. in the Court of first instance (10) was adopted by the House of Lords. That judgment is conclusive. An omnibus business is a separate thing; it is not incidental to the undertaking of a railway. There is no difference for this purpose between tramways and railways. A railway company cannot use omnibuses any more than it can use steamboats without special powers. The general powers of a railway company under s. 86 of the Railways Clauses Act, 1845, to carry and convey upon the railway all such passengers are similar to those of a tramway company: *Attorney-General* v. *Manchester Corporation.* (4) There is no decision to the contrary in *South Wales Ry. Co.* v. *Redmond.* (1) A railway company must not spend its money in subsidizing a steam-packet company: *Colman* v. *Eastern Counties Ry. Co.* (11) The distinction between passengers and merchandise is maintained in all the cases which have been cited.

(1) (1861) 9 W. R. 806.
(2) (1885) 15 Q. B. D. 505, 537.
(3) (1866) L. R. 1 Ex. 137.
(4) (1906) 22 Times L. R. 261 (since reported [1906] 1 Ch. 643).
(5) (1883) 11 Q. B. D. 485.
(6) (1879) 11 Ch. D. 449, 480.
(7) (1861) 30 Beav. 40.
(8) (1891) 7 Ry. & Ca. Tr. Cas. 156, 169.
(9) [1902] A. C. 165.
(10) [1901] 1 Ch. 781.
(11) (1846) 10 Beav. 1, 15, 16.

A railway company is authorized at the request of the trader to charge through rates for delivering goods, and it was assumed from that that it could deliver the goods off the railway. The practice was recognized by statute: Railway and Canal Traffic Act, 1888, s. 33; London and North Western Railway Co. (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), s. 5; Browne & Theobald's Law of Railways, 3rd ed. p. 834. It has never been held that a railway company can distribute or collect passengers.

WARRINGTON J. stated the facts, and continued:—With regard to the law both sides are agreed as to the principle which is to be applied to this case. The only difficulty arises in the application of it. The principle is stated by the Lord Chancellor (Lord Selborne L.C. in *Attorney-General* v. *Great Eastern Ry. Co.* (1)) He says this: "I assume that your Lordships will not now recede from anything that was determined in *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (2) It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with James L.J. that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires." What, therefore, I have to determine is whether what the railway company are doing in this case may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized, namely, the construction and use of their railway. It is admitted on both sides that the question whether an omnibus service may be maintained by a railway company for the distribution and collection of its passengers has never been the subject of judicial decision. Mr. Neville, for the railway company, referred to an old case—*South Wales Ry. Co.* v. *Redmond* (3)—in which there is a dictum of Willes J. to the effect that in his opinion it would not be ultra vires for a

(1) 5 App. Cas. 473, 478. (2) (1875) L. R. 7 H. L. 653.
(3) 9 W. R. 806.

WARRINGTON J.
1906
ATTORNEY-GENERAL v. MERSEY RAILWAY.

railway company to provide for an omnibus service. But that dictum must be taken in connection with the case in which it was used, and I think it is absolutely accurate to say that there is no case in which this subject has been matter for judicial decision, or even for a dictum which can be regarded as actually in point.

The Attorney-General and the corporation rely mainly on *Attorney-General* v. *London County Council* (1), in which it was decided that the London County Council were not authorized in connection with their tramway service in maintaining a service of omnibuses. It was said by the plaintiff that that case bound the present. It was said, on the other hand, by the railway company that there was not sufficient analogy between the business of a railway company and that of a tramway company to require the Court to apply the principles expressed in that case to the present; and I think myself that the question which I really have to determine is whether *Attorney-General* v. *London County Council* (1) is an authority which ought to apply to this case.

Now, before I come to that, it is necessary to consider the further argument which was addressed to me on behalf of the railway company, which is this, that it is undoubted that ever since railways in the development of their history became common carriers of goods they have, and have properly, collected merchandise for carriage on their railways, and distributed it after carriage on their railways. As to that there is no question, and cases have been cited for the purpose of establishing that that practice is recognized by the Courts as being a legal practice authorized by the ordinary railway Acts. That is undoubtedly so, but I do not think that the principle applicable to those cases applies to the case of passengers. When the cases in which the practice of railway companies in that respect is dealt with are looked at it will, I think, be found that there are only dicta, because the actual decisions are on the authority of railway companies to charge for extra services. The Courts in the particular cases before them were dealing with railway companies having statutes containing clauses which referred to charges for

(1) [1901] 1 Ch. 781; [1902] A. C. 165.

collection and distribution of goods; thereby recognizing that it was one of the things which a railway company could do and for which it could make charges. But I have had my attention called to no such provision in any Act of Parliament with regard to passengers. It comes back, then, to this: Is the distribution and collection of its passengers fairly incidental to or consequential upon the business of a railway company?

I must not forget that I have had it in evidence that it is the practice, and has for years been the practice, of certain railway companies—for example, the London and North Western Railway Company in connection with its station at Euston—to provide private omnibuses for the collection and distribution of its passengers, and to also provide public omnibuses which run from Euston to Charing Cross and Waterloo, and other places in the south of London. On the other hand, certain railway companies have thought it desirable to obtain, and have obtained from Parliament, special powers authorizing them to organize and carry on an omnibus service. I think of the former class the North Western is the strongest case. I have had a representative of the company here before me, and he has shewn me time tables relating to their services. There are a number of omnibus services organized and carried on by the company, and, as he has told me, without any special statutory authority and without any objection. But really those facts have, I think, very little effect upon the decision which I ought to give, except this, that they do shew that in the minds of persons employed in and acquainted with the business of railway companies the distribution and collection of passengers is regarded as being incidental to the business of a railway company.

Now I come, I think necessarily, to the case of *Attorney-General* v. *London County Council* (1), and I have to see whether the principles of that case are or are not applicable to the present. In that case the position was this: There were certain tramways owned by a tramway company. There were three termini on the south side of the river Thames—at Blackfriars Bridge, at Westminster Bridge, and at Waterloo Bridge. The

(1) [1901] 1 Ch. 781.

WARRINGTON J.
1906
ATTORNEY-GENERAL v. MERSEY RAILWAY.

tramway company having originally a memorandum of association which authorized them to use and work the tramways only, had, under the Companies (Memorandum of Association) Act of 1890, obtained powers to organize and carry on an omnibus service, and they had three omnibus services connecting their termini on the south side of the river with places on the north side of the river. The London County Council had power to purchase, and did purchase, the tramway undertaking of the tramway company. The statutory powers which they had were contained in s. 2 of the London County Tramways Act, 1896, which was as follows: "It shall be lawful for the council to exercise with respect to any tramways authorized by the local Acts mentioned in the schedule to this Act which have been or shall be purchased or acquired by them under their statutory powers the same powers of working such tramways respectively as were possessed by the company or companies respectively owning such tramways and the council may provide place and run carriages thereon and provide such horses cars fixed and moveable plant harness and apparatus as may be requisite or convenient for enabling the council to exercise such powers and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by them." In purchasing the tramway undertaking the London County Council and the vendors, the parties to the agreement, excluded the goodwill of the omnibus business. After the purchase of the tramways, the London County Council instituted and, until restrained by the injunction which was granted in that case, carried on an omnibus business slightly different from that which had been carried on by the tramway company, inasmuch as they not only ran from the south side of the river to places on the north side of the river and back, but they ran their omnibuses along the Strand. Now the question in that case was really the general question whether the business of omnibus proprietors was a business incidental to the business of tramway proprietors. Cozens-Hardy J., whose judgment was accepted by the House of Lords, begins his judgment by citing, not the passage from Lord Selborne's judgment which I have read, but a passage from the speech of Lord

Blackburn in the same case—*Attorney-General* v. *Great Eastern Ry. Co.* (1)—which is substantially to the same effect as the passage in Lord Selborne's speech. After stating the facts Cozens-Hardy J. says this (2): "The tramways which alone the county council were empowered to purchase have certain definite limits at the southern and northern ends. Within those termini the county council may, in the language of the section, 'work' the tramways and convey passengers in tramcars. There are many things fairly incidental to this which they may do, and, indeed, must do. They may have stables and sheds for their horses and cars, they may have carts and horses to convey forage to their stables. In short, anything reasonably proper for the 'working' of the tramways is within their powers. Anything not falling within this definition is outside their powers. It seems to me that the London County Council are really carrying on a separate and distinct business as omnibus proprietors. They do not, and they cannot lawfully, convey in their omnibuses only passengers from and to their tramways. By the Act of 1843, for regulating hackney and stage carriages in and near London, they are bound to take any passenger who desires a ride and is willing to pay a halfpenny, provided there is a vacant seat. The running of omnibuses in the streets of London is certainly not expressly authorized by the Act of 1896, and, in my opinion, it is not impliedly authorized. It is not for me to consider whether the business of omnibus proprietors is one which may conveniently or advantageously be combined with the business of working the tramways." So here in this case it is not for me to consider whether the business of omnibus proprietors may be conveniently or advantageously combined with the business of the Mersey Railway. That I assume. Now I think it is clear from that judgment of Cozens-Hardy J. that he does not rest his judgment on the fact that the tramway company were carrying on two distinct businesses, one authorized by their original memorandum, the other authorized by the amended memorandum. I think he is dealing with it exactly as if the tramway company had been itself doing that which this railway

(1) 5 App. Cas. 473. (2) [1901] 1 Ch. 790.

WARRINGTON J.
1906
ATTORNEY-GENERAL v. MERSEY RAILWAY.

company were doing, namely, carrying on the business of omnibus proprietors on the supposition that it was incidental to their business as tramway proprietors.

In the House of Lords that judgment, having been first affirmed in the Court of Appeal, again came up for consideration, and for the purpose of the present case I will first refer to the speech of Lord Macnaghten. He said this (1): "The London County Council are carrying on two businesses"—exactly the words used by Cozens-Hardy J.—"the business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament; for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a seaport."

I now go back to Lord Halsbury's speech, and I begin at the end of it to shew what was actually in his mind in the words which he used at the beginning, to which I shall come presently. He said at the end (1): "I do not think it necessary to go through this case, because the very elaborate and careful judgments delivered both by Cozens-Hardy J. and by the three learned Lords Justices in the Court of Appeal appear to me to exhaust the whole question." Now I go back to what he says at the beginning, because it was on this that Mr. Neville mainly rested his contention that the London County Council case is not applicable to the present. He begins by referring to the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2), and *Attorney-General* v. *Great Eastern Ry. Co.* (3) Then he says this (4): "So far as the particular questions before us here are concerned, depending as they do upon the statute itself, with the utmost respect for the learned counsel, I think the contentions hardly admit of plausible statement. The power which is expressly given to the London County Council excludes from

(1) [1902] A. C. 169.
(2) L. R. 7 H. L. 653.
(3) 5 App. Cas. 473.
(4) [1902] A. C. 167.

them, and to my mind is intended to exclude from them, that which did exist as a separate business under the earlier statute, and which was not intended, and obviously was not intended, to be conferred upon the London County Council. It appears to me to be, as I say, hardly susceptible of plausible statement to suggest that those words can possibly include this separate business. The only argument which, as it appears to me, is capable of plausible statement in the matter is the argument derived from the somewhat clumsy phrase used in the statute with reference to their being in the same position as the council of a borough divided into wards." That is, of course, not material to the present case. Now, it is quite true that Lord Halsbury was, in the view he took, mainly affected by the form taken by the statute of 1896. But having regard to his express approval of the judgment of Cozens-Hardy J., I think the true inference from his judgment is that though he considered that the form of the statute of 1896 was sufficient to enable him to decide the case, and was the strongest point against the London County Council, it is clear that he did not disagree with the more general statement made by Cozens-Hardy J. and by Lord Macnaghten. It seems to me, therefore, that I must adopt that case as decisive of the question whether a tramway company is or is not, by the power to maintain and work a tramway, authorized to maintain and work an omnibus service.

But that, of course, does not exhaust the question. I have then to consider whether this decision, in reference to a tramway company, applies to a railway company. Mr. Neville has said that it does not. He says there is this main distinction, which is of course true, between a railway company and a tramway company, that a tramway company is, in its origin at all events, for internal communications within a particular town, while a railway company is organized, and a railway is constructed, for the purpose of conveying passengers from one place to another, and from and to intermediate stations on that line. And he says that that distinction is most material for this reason, that it certainly would be an extraordinary thing that a tramway company authorized to construct and use the tramway between certain points in a particular town—that is, to maintain a

WARRINGTON J.
1906
ATTORNEY-GENERAL v. MERSEY RAILWAY.

particular form of omnibus service in a particular town—should be at liberty, without further authority, to extend its services by means of another kind of omnibus—namely, an omnibus not run on tram lines—to a position outside those points. I fully feel the force of that remark; but I cannot bring myself to think that it really establishes the point which he tried to establish, namely, that the principle stated by Cozens-Hardy J. and by Lord Macnaghten in *Attorney-General* v. *London County Council* (1) did not apply to the case of a railway. I have tried hard to see how far it really could be said to be incidental to or consequential upon the conveyance of passengers from one place to another on the railway to convey those passengers to another place away from the railway. If it is incidental to the business of a railway company to convey passengers by omnibus, we will say from the Central Station on the Mersey Railway to the Oxton district in Birkenhead, I cannot see where the limit of place is to be drawn, or why it should not be, as Lord Macnaghten says in the House of Lords, incidental to the business of a railway company having a seaport to convey its passengers to their destination over the sea. In principle and logically there seems to me to be no distinction between the two. In either case the passenger who has been conveyed upon the railway wants to go to a destination which is outside the railway, and it seems to me it can make no difference whether he is to be conveyed to that destination by means, as in the present case, of a motor omnibus, or whether he is to be conveyed to that destination by a steamship.

There is one other case which I ought, perhaps, to refer to: *Attorney-General* v. *Manchester Corporation.* (2) In that case Farwell J. held that the corporation of Manchester, in connection with their tramway undertaking, were authorized to collect and deliver parcels strictly in connection with their tramway undertaking. No doubt he did, but I think when his judgment is looked at it will be seen clearly that he rested it on the strict analogy between a railway company and a tramway company in reference to the conveyance of merchandise. It does not govern

(1) [1901] 1 Ch. 781; [1902] A. C. 169.

(2) 22 Times L. R. 261 (since reported [1906] 1 Ch. 643).

the case of the collection and distribution of passengers, and is in fact entirely distinct from it. So far as it is an authority at all in the present case, I think it is an authority on the point which I have just been discussing, namely, the question whether the undertaking of a tramway company is, for such a purpose as this, analogous to that of a railway company, and so far it is an authority in favour of the plaintiffs.

On the whole I think—though I confess with some reluctance—I must come to the conclusion that the business of omnibus proprietors, such as that which is being carried on by the Mersey Railway Company, is not incidental to or consequential upon the authority given to them to maintain and use a railway, and accordingly the plaintiffs are entitled to succeed.

Solicitors: *F. Venn & Co., for Alfred Gill, Birkenhead; Linklater, Addison, Brown & Jones.*

H. C. R.

FULLER *v.* WHITE FEATHER REWARD, LIMITED.

[1906 F. 372.]

Company—Amalgamation—Memorandum of Association—Reconstruction under power in Memorandum—Sale of Assets for Shares in new Company—Partly-paid Shares—Distribution of Consideration—Offer of Shares to all Shareholders.

One of the objects of a company was to sell and dispose of its property for such consideration as it thought fit, and in particular for shares fully or partly paid up, and to divide the consideration amongst the members of the company. This power was to be exercisable either in view of a winding-up of the company or not. Another object was to distribute any of the assets of the company among the members of the company.

The company agreed to sell its assets and undertaking to another company. By the agreement the vendor company was to be wound up; part of the consideration was to consist of partly-paid shares to be allotted to the vendor company or its nominees. The vendor company were within two calendar months to find people to take up these shares, and if any of them were not taken up they were to be at the disposal of the purchasing company, and the vendor company was not to be liable to take them up itself. Resolutions were passed and confirmed at meetings of the vendor company to wind up that company voluntarily, and that

WARRINGTON J.

1906

FULLER v. WHITE FEATHER REWARD, LIMITED.

the liquidator should offer the new shares to the members at the rate of one such share for each share held by the members.

By the amalgamation scheme it was provided that the liquidator should sell shares which were not accepted by the shareholders and distribute the net proceeds of sale among such members. A shareholder in the vendor company objected to these proposals :—

Held, that the proposed scheme of reconstruction was within the powers conferred by the memorandum, and ought to be allowed to proceed.

MOTION by a shareholder in the company for an injunction to restrain the White Feather Reward, Limited, and the liquidator thereof from carrying out an agreement for reconstruction.

The company was registered on November 19, 1900, for mining purposes, with a capital of 140,000*l.* in shares of 1*l.* each. By clause 3 of its memorandum of association the objects for which the company was established were stated to be (inter alia) :—

"(*w*) To sell, lease, exchange, surrender, improve, manage, develop, mortgage, dispose of, turn to account, or otherwise deal with the undertaking and property and rights of the company, or any part thereof, for such consideration as the company may think fit, and in particular for any shares, fully or partly paid up, debentures, fully or partly paid up, or securities, fully or partly paid up, or property of any other company, and to divide such part or parts, as may be determined by the company, of the purchase-moneys, whether in cash, shares or other equivalent, which may at any time be received by the company on a sale of, or other dealing with, the whole or any part of the property, estate, effects and rights of the company amongst the members of the company, by way of dividend or bonus in proportion to their shares, or to the amount paid up on their shares, or otherwise to deal with the same, as the company may determine. And the powers claimed in this and the preceding sub-s. (*v*) shall be exercisable, whether in view of a winding-up of the company or not.

"(*x*) To distribute any of the assets of the company among the members in specie, or otherwise, but so that no distribution amounting to a reduction of capital be made without the sanction of the Court where necessary."

There was nothing in the articles material to the present application. All the shares of the company had been issued and were fully paid.

By an agreement of January 22, 1906, made between the company (thereinafter called the vendor company) of the one part and the White Feather Main Reefs (1906), Limited (thereinafter called the purchasing company), of the other part, after reciting that one of the objects of the vendor company was to sell their undertaking; that the purchasing company had been formed with a capital of 75,000*l*, divided into 300,000 shares of 5*s*. each, and with power (inter alia) to acquire the property of the vendor company; and that the vendor company was desirous of selling its undertaking and property to the purchasing company for shares therein, it was provided as follows:—

"1. The vendor company shall sell, and the purchasing company (when incorporated) shall purchase, all the undertaking, business, lands, mines, mineral rights, and other property and effects of the vendor company of any kind or nature whatsoever, and all machinery, plant and chattels, money credits, debts, bills, notes, goodwill, things in action, securities, the benefit of all agreements, and all its other assets whatsoever.

"2. As part of the consideration for the said sale, the purchasing company shall undertake, pay, satisfy, and discharge all the existing debts, liabilities and obligations of the vendor company, and shall perform and fulfil all the pending and uncompleted contracts and engagements of the vendor company.

"3. As a further consideration for the said sale, the purchasing company shall, if the vendor company within six months from the date hereof passes an effective resolution for the voluntary winding-up thereof, pay all the costs, charges and expenses of and incident to the winding-up and dissolution of the vendor company.

"4. As a further consideration for the said sale, the purchasing company shall allot to the vendor company, or at the vendor company's option to its nominees, as hereinafter mentioned, 140,000 shares of 5*s*. each in the capital of the purchasing company, credited with 3*s*. 6*d*. per share as paid thereon in the books of the purchasing company.

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

"5. The vendor company shall apply or find substantial nominees who will, within two calendar months after the date hereof, or within such extended time as may be mutually agreed between the parties hereto, apply for and accept an allotment of the said shares, and pay 6*d.* per share on application and agree to pay 6*d.* per share on April 30, and the remaining 6*d.* per share on June 30. Shareholders in the vendor company shall be considered substantial for the purpose of this clause.

"6. In the event of the vendor company failing to comply with the conditions of the last preceding clause with regard to any of such shares so to be applied for (for which purpose time shall be of the essence of the contract), the shares unapplied for by the vendor company, or in respect of which substantial nominees shall not have been found who shall have applied for and accepted an allotment as aforesaid, shall be at the disposal of the purchasing company, and the vendor company shall not be under any liability to become a member of the purchasing company in respect of any of the said shares."

Then followed provisions as to title and conveyance, and that the sale should be completed within three calendar months from the date of the agreement.

On January 23 the directors issued a report to the shareholders, which referred to the agreement for amalgamation and contained this clause:—

"In order, however, to provide funds for further development and alterations with a view to economical working, it will be necessary to ask the shareholders to agree to an assessment of 1*s.* 6*d.* on both company's shares, and it is now proposed to register a new company with a capital of 75,000*l.* in 300,000 5*s.* shares (in place of 1*l.* shares as at present), credited with 3*s.* 6*d.* paid, of which 140,000 are allocated for shareholders in this company and 160,000 for shareholders in the White Feather Main Reefs, Limited; these figures representing the number of shares issued in both companies."

At the same time the directors sent out a notice that the ordinary general meeting of the company would be held on January 31, when the meeting would be asked to consider an

appended amalgamation scheme and pass the following resolutions:—

"1. That the amalgamation scheme submitted to this meeting be and the same is hereby approved.

"2. That it is desirable to wind up this company, and accordingly that the White Feather Reward, Limited, be wound up voluntarily.

"3. That the liquidator of the company be and is hereby, as and from the date of his appointment, authorized and required to offer the shares of the new company of 5*s.* each (credited with 3*s.* 6*d.* as paid up thereon), receivable under the agreement for sale referred to in the amalgamation scheme for distribution among the members of the company, at the rate of one of such new shares for each share in the existing company held by such members.

"4. That in the event of any of the said members not accepting their due proportion of such shares within a time to be limited in such offer (not being less than fourteen days), the liquidator be authorized and required to use his best endeavours to sell the shares not so accepted upon the best terms obtainable, and to hold the net proceeds of such sale upon trust to distribute the same among such members."

The notice proceeded to state that resolutions 3 and 4 would be submitted as extraordinary resolutions, and resolution 2, if passed, would be submitted for confirmation as a special resolution at a subsequent meeting.

The appended amalgamation scheme was as follows:—

"1. A new company called 'The White Feather Main Reefs (1906), Limited,' has been formed and registered, and will have a capital of 75,000*l.*, divided into 300,000 shares of 5*s.* each.

"2. The new company purchases from the present company and the White Feather Main Reefs, Limited, their respective undertakings and assets for a consideration consisting of (*a*) 299,993 shares of 5*s.* each, of which 140,000 are allocated to the White Feather Reward, Limited, and 159,993 to the White Feather Main Reefs, Limited. The said shares are credited as being paid up to the extent of 3*s.* 6*d.* per share, and have a liability of 1*s.* 6*d.* per share, payable 6*d.* on application, 6*d.* on April 30, 1906, and 6*d.* on June 30, 1906; and (*b*) the payment

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

and satisfaction of the debts and liabilities of the companies, including the cost of liquidation.

"3. The present companies to go into voluntary liquidation, and the liquidator to offer the shares in the new company (credited with 3*s.* 6*d.* per share as paid up thereon), receivable as above for distribution among the members of the respective companies, at the rate of one of such new shares for each share in the existing companies held by such members.

"4. In the event of any of the said members not accepting their due proportion of such shares within a time to be limited in such offer (not being less than fourteen days), the liquidator shall use his best endeavours to sell the shares not so accepted upon the best terms obtainable, and shall distribute the net proceeds of such sale among such members."

The meetings were held and the resolutions duly passed. The plaintiff was a holder of fully-paid shares in the vendor company. He objected to the scheme and commenced an action against the vendor company and its liquidator, and now moved that the defendants might be restrained until the trial or further order from carrying into effect the agreement, or in the alternative from distributing the shares in accordance with the provisions of that agreement or from selling any of the shares not applied for by members of the defendant company in manner provided for by resolution 4 or from disposing of the said shares or any of them otherwise than in accordance with the rights of the members of the defendant company.

Cave, K.C., and *Martelli*, for the motion. The whole transaction is ultra vires. It is an attempt to reconstruct the company and to impose a liability on existing shareholders by evading the provisions of s. 161 of the Companies Act, 1862. That will not be allowed: *Payne* v. *Cork Co.* (1) It is a device to compel fully-paid shareholders to contribute further capital or forfeit their interest, similar to the scheme which was disapproved in *Manners* v. *St. David's Gold and Copper Mines, Ld.* (2), and *Bisgood* v. *Nile Valley Co.* (3)

(1) [1900] 1 Ch. 308. (2) [1904] 2 Ch. 593.
(3) (1906) 22 Times L. R. 317. Since reported ante, p. 747.

Assuming that the agreement can be dealt with apart from the other circumstances, we submit that it is not an agreement for sale within clause 3 (*w*) of the memorandum. This is not a sale in the proper sense of the term. At the best it is a forced sale, for the shares have to be taken up within a limited time. But this is all one transaction, and the agreement cannot be taken separately as in *Mason* v. *Motor Traction Co.* (1) The agreement itself deals with the method of distribution of the new shares. That method is not in accordance with the rights of shareholders in a winding-up. It creates a difference between assenting and dissenting shareholders. The latter are not protected, and there is no equality between the two classes. The scheme is ultra vires, and there is no case in the books in which such a transaction has been supported.

H. Terrell, K.C., *Gore-Browne, K.C.*, and *W. H. Cozens-Hardy*, for the company. There is nothing in any part of the transaction which is ultra vires of the company. The agreement is a bona fide agreement for the sale of the undertaking and assets of the old company. It is a reasonable business transaction, there is nothing unfair in it, and it ought to be sanctioned: *Burdett-Coutts* v. *True Blue* (*Hannan's*) *Gold Mine.* (2) Under clause 3 (*w*) the company can sell for partly-paid shares in the new company: *Mason* v. *Motor Traction Co.* (1) The clause also provides for a sale with a view to a winding-up, as in *Doughty* v. *Lomagunda Reefs, Ld.* (3), and the Court will divide the proceeds of sale among the shareholders who do not accept the new shares: *In re Lake View Extended Gold Mine* (*Western Australia*), *Ld.* (4)

The first case in which it was held that a company could sell its undertaking under its memorandum was *Grant* v. *United Kingdom Switchback Railways Co.* (5) That was followed in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (6), *New Zealand Gold Extraction Co.* (*Newbery-Vautin Process*) v. *Peacock* (7), and *Wall* v. *London and Northern Assets Corporation.* (8)

(1) [1905] 1 Ch. 419.
(2) [1899] 2 Ch. 616.
(3) [1902] 2 Ch. 837.
(4) [1900] W. N. 44.
(5) (1888) 40 Ch. D. 135, 140.
(6) [1892] 3 Ch. 454.
(7) [1894] 1 Q. B. 622.
(8) [1898] 2 Ch. 469.

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

The recent authorities cover this case, and if this transaction is held to be illegal it is difficult to see how any reconstruction under powers contained in a memorandum can be valid. The scheme of distribution is fair, and it is not fixed by the agreement. There is nothing in it which produces inequality or prefers one shareholder to another, as in *Bisgood* v. *Nile Valley Co.* (1) If dissentient shareholders will not take the new shares they are to be sold and the proceeds paid to them. There is nothing unfair in that. The shares are offered to all shareholders equally. There is nothing unfair in calling on the shareholders to make a payment in order to get the new shares: *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (2) The holder of one share in the old company is not entitled to say that all the new shares must be sold and the proceeds divided, or that because he does not want his new shares other shareholders shall not have theirs.

Even if the resolutions for reconstruction are ultra vires, the contract is valid as between vendor and purchaser.

[WARRINGTON J. referred to *Kaye* v. *Croydon Tramways Co.* (3)]

There is authority for taking the agreement and the distribution separately and sanctioning the former: *Booth* v. *New Afrikander Gold Mining Co.* (4); *Mason* v. *Motor Traction Co.* (5) The directors there, as in this case, had an absolute power to sell, and did sell. Whatever view the Court may take of the scheme of distribution, the agreement for sale at any rate is binding. The mere fact that a company may contemplate a distribution which may be ultra vires does not render the agreement for sale invalid. The scheme is one thing and the agreement is another, although they may be both contemporaneous in the mind of the selling company. There is nothing in the agreement which is ultra vires, and the Court cannot say that it ought not to be carried out. Therefore the Court will sanction the agreement apart from the rest of the transaction: *Mason* v. *Motor Traction Co.* (5)

(1) 22 Times L. R. 317. Since reported, ante, p. 747.
(2) (1889) 43 Ch. D. 452.
(3) [1898] 1 Ch. 358.
(4) [1903] 1 Ch. 295.
(5) [1905] 1 Ch. 419.

The fact that the shares have to be sold within a limited time does not vitiate the scheme. The shareholders are not deprived of their right to dissent. No doubt the shareholders' hands must not be tied as to the manner of distribution: *Griffith* v. *Paget* (1); and the distribution must be in accordance with their rights: s. 133 of the Companies Act, 1862; but no practical alternative to this scheme can be suggested.

Cave, K.C., in reply.

WARRINGTON J. This is a case of considerable general importance, and I am extremely indebted to counsel on both sides for the assistance they have given me in deciding it. The application is made on the part of a shareholder in the defendant company for an order to restrain the company from carrying into effect an agreement of January 22, 1906, for the sale of their undertaking, or in the alternative from distributing the shares given as consideration otherwise than in accordance with the rights of the members of the company. The only question which I have to decide is, whether certain arrangements, to which I will refer more in detail directly, are wholly or in part ultra vires the defendant company. I desire to say at once that I have not to decide whether these arrangements are fair or unfair to shareholders in the company, and also that the Court is not in a position, and has not the materials before it, to say whether the arrangements are fair or not; and I expressly abstain from expressing any opinion on that subject. I have only to decide the neat question whether what is proposed is within the powers of the defendant company. [His Lordship stated the facts, and continued:—]

The plaintiff is a holder of fully-paid shares in the defendant company; he objects that the agreement and resolutions are ultra vires the company, and the question is whether he is right. The first question is whether the agreement is or is not within the powers of the memorandum of association. It is said that it is not, and that the sale is not a sale within clause 3 (*w*) of the memorandum. The clause is in extremely wide terms, and provides that the company may sell its undertaking and property for fully or

(1) (1877) 5 Ch. D. 894.

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

partly paid up shares. Even, therefore, if there were no authority on the point, the fact that the sale was for partly-paid shares would not, having regard to the clause, render the agreement outside the memorandum. From the facts which I have stated it is plain that the agreement was entered into in view of a winding-up. In that respect, again, even if there was no authority on the point, the agreement would not be any the less a sale within this clause. But, indeed, on both these points there is authority. It is singular how many of the points raised in this case, by themselves, are covered by authority. The particular point that a sale for unpaid shares, though in view of a winding-up, would not, in the absence of the special provisions to which I have referred, be otherwise than a sale of the undertaking within the clause of the memorandum was decided by Buckley J. in *Mason* v. *Motor Traction Co.* (1) The head-note there is: "A company authorized by its memorandum of association to sell its undertaking for 'shares' may, if there is nothing in the context or in the memorandum or articles of association as a whole so to qualify the meaning of the word 'shares' as there used as to confine it to fully-paid shares, accept partly-paid shares as consideration." The sale there was with a view to a winding-up, as was the case also in *Doughty* v. *Lomagunda Reefs, Ld.* (2) So far, therefore, both on the express terms of the memorandum and upon authority, the fact that the sale was for partly-paid shares and in view of a winding-up does not cause it to be ultra vires.

But it is further said that the sale was not within the memorandum because of the provisions of the agreement with reference to the taking up by the old company or its nominees of the partly-paid shares. Looking at it for the moment as an agreement between vendor and purchaser, and having regard to the peculiar nature of the consideration—namely, partly-paid shares—I can see nothing in it to render it anything but a bona fide sale of assets by one company to another. The agreement is in effect one by which a new company purchases the assets with the object of working those assets and carrying on the business for which it was formed; and it is plain from the terms

(1) [1905] 1 Ch. 419. (2) [1902] 2 Ch. 837.

of the agreement that in order to carry on the business the new company must be provided with funds, which it will derive from the circumstance that part of the consideration is partly-paid shares. Bearing that in mind, it was necessary for the protection of the vendor company, and to enable the purchasing company to get the benefit of the bargain, to make some provisions as to taking up the shares. It was necessary for the vendors to prevent themselves from being under an obligation to take the shares themselves, and be put upon the register and become liable for unpaid calls; and it was necessary for the purchasing company to make some stipulation to ensure, so far as it was possible, the provision of further capital, so as to enable the assets to be employed profitably. Looking at it from this point of view, that is what is provided for by clauses 5 and 6 of the agreement. Clause 5 provides, so far as it is possible, for obtaining fresh capital; it puts the old company under a liability either to take up the shares themselves or to find substantial nominees; the nominees may be the company's own shareholders or not, but the company is to find them within a limited time. That obligation was modified by a subsequent clause; clause 6 provides that if the company fail to take up, or to find nominees for, the shares within the limited time, they shall not be bound to take the shares themselves, so as to render themselves liable for calls, but the shares which are not taken shall be at the disposal of the purchasing company. Looking at it only as an agreement for sale and purchase in contemplation of a winding-up, I think those provisions are reasonable, and do not make it any the less an agreement for sale within clause 3 (*w*) of the memorandum.

But the plaintiff says the agreement cannot be looked at by itself. To a certain extent that argument is true. The agreement was part of a series of transactions the object of which was to bring about the reconstruction of the existing company with a capital not fully, but partly, paid up. But that does not carry the matter very far. Although the agreement was made with a view to winding-up, it left the vendor company free, within limits which were reasonable as between vendor and purchaser, to deal with the consideration money as they thought fit. The authority

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

which was most relied upon by the plaintiff on this point was *Manners* v. *St. David's Gold and Copper Mines, Ld.* (1) The effect of that decision was that the Court of Appeal came to the conclusion that the agreement in that case was not a sale within the memorandum, but was a device to compel fully-paid shareholders to contribute further capital or forfeit their shares. A vital distinction between that case and the present is that the agreement there bound the vendor company to deal with the consideration in a particular manner, and contained a provision to the effect that any shareholder who did not accept the partly-paid shares forfeited for the benefit of the purchasing company his share in the assets of the vendor company. That was the essential element which brought about the decision of the Court of Appeal. The agreement there contained a provision, much as in the present case, that as part consideration for the transfer the new company should allot to the old company, or as they should direct, so many shares of 5*s*. each with 4*s*. credited as paid up, and that as further consideration the new company should satisfy the debts and liabilities of the old company and pay the expenses of liquidation. Then it went on: "In case the old company shall go into liquidation within the time aforesaid and distribute the shares forming the consideration for the said sale among its members all shares not accepted by such members within twenty-one days of the commencement of the winding-up or such extended time as the new company shall consent to shall be sold by the old company and shall be applied in payment of debts and liabilities of the old company in relief of the obligation of the new company under this agreement." The obvious result of the provisions of the agreement there was to compel a shareholder in the vendor company either to take the partly-paid shares which were offered, or to lose all his interest in the vendor company, and not only that, but the value of his interest, that is the purchase-money which he might have obtained for the shares if taken up, went wholly to the purchasing company, for it was to go to discharge their obligation to pay the debts of the old company. That fact was the ground of the decision of the Court of Appeal, and, particularly, of the

(1) [1904] 2 Ch. 593.

judgment of Romer L.J. After stating the nature of the agreement and that it would not be justified by s. 161, and pointing out that a liquidation was essential inasmuch as a going company could not distribute its assets among its shareholders in that way, for it would amount to a return of capital, he goes on to say (1): "But it is said that you can justify a provision in such a contract whereby, as in this case, it is made a term of the contract that if a liquidation takes place, then the liquidator shall divide the assets in a particular way, and so that if a shareholder does not choose to take upon himself a particular liability which he is not bound to take upon himself, his share of the assets shall be forfeited and the proceeds handed over to the purchasing company. To my mind such a contract is altogether ultra vires of the selling company. It is not justified as a sale under sub-s. (*f*)." That corresponds with clause 3 (*w*) in the present case. "The purchasing company has no right or power to make it a term of such contract that the assets shall be dealt with in that way, nor can the selling company under the pretended exercise of the powers of sub-s. (*f*) pretend to sell its assets with a special contract in favour of the purchasing company that, if a liquidation takes place within a year, the liquidator shall be bound to do something which otherwise the liquidator might not be bound to do, and further that individual shareholders shall be bound to lose their share of the assets, as I have said, for the benefit of the purchasing company if they do not choose to take upon themselves a liability which they are not bound to take upon themselves." That, then, was the ground of the decision, namely, that the agreement which was entered into contained a stipulation which was not authorized by the memorandum under which they purported to act. In the present case there is no such stipulation as that. It is left open to the vendor company to make any arrangements they like. Cozens-Hardy L.J. puts it on the same ground. He says (2): "It is also quite clear that the transaction is not one under s. 161, and that if it can be supported at all it must be supported as falling within sub-s. (*f*) of clause 3 of the memorandum. I do not desire to go again over the ground which has been traversed by my Lord, but it seems

(1) [1904] 2 Ch. 605. (2) [1904] 2 Ch. 606.

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

to me to be impossible to support this agreement as a sale within the meaning of that sub-section. The agreement is a document which purports to impose certain obligations upon the liquidator in the event of a winding-up, and to impose certain penalties upon a shareholder of the old company if and when the liquidation takes effect. It is something altogether different from a contract within the contemplation of sub-s. (*f*), which is a contract for a sale out and out of the whole undertaking, which may be for shares, but the shares when received by the going company must be dealt with as part of the assets of the going company, or distributed in due course under the winding-up of the company." So far as the present agreement is concerned it is, within those words of Cozens-Hardy L.J., a contract for a sale out and out, which may be for shares, but the shares must be dealt with as part of the assets of the going company, or distributed in due course under the winding-up of the company.

Now I come to the final point on which the plaintiff relies. Is the proposed distribution otherwise than in accordance with the due course of winding-up? Each shareholder is to be at liberty to take the shares which are offered to him—the shares are to be offered to all the shareholders indiscriminately—but there is the further provision that if any number of shareholders shall not desire to take their shares they shall be sold and the proceeds distributed among them in proportion to the shares held by them in the old company. I do not think there is anything in this otherwise than in accordance with a distribution in due course of administration in a winding-up. That expression means that the assets shall be sold and the proceeds divided according to the rights of the members of the company, or else, under clause 3 (*x*) of the memorandum of association, be distributed among the members in specie. I assume that the company, having no assets except these shares, propose to distribute them among the members in specie. That would be in due course of winding-up. Is it any the less in due course of winding-up because some shareholder to whom shares are offered refuses to accept them either because he does not wish to be under the liability for the amount unpaid on them, or because he does not care to hold the shares, or for some other reason?

Is it made improper because if some shareholder refuses to take up his shares they are to be sold and the proceeds distributed? I think the question is covered by *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine.* (1) It is true that that was a case of a distribution in a winding-up after a sale under s. 161, but the remarks of the Lords Justices apply to the case of a sale under the provisions of a memorandum of association. We are now dealing only with the distribution; we have got beyond the point where a shareholder may dissent, and are dealing with the carrying into effect of the scheme in regard to the shares of members who have not dissented. Sect. 161 says that the liquidator may receive in compensation or part compensation for the transfer or sale of the property of the company being wound up, amongst other things, "shares" in the purchasing company "for the purpose of distribution amongst the members of the company being wound up." That is what the liquidator has to do. He has to distribute the shares which he receives amongst the members of the company being wound up. In the present case, under the memorandum of association, unless he sells the shares he has to distribute them among the members of the company. What does the Court of Appeal say in *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine?* (1) There, as here, the agreement contained provisions for dealing with shares not taken up and for the value to be paid to refusing shareholders. In effect, it provided that every shareholder should be entitled as of right to claim an allotment to him of one partly-paid share in the new company for each share held by him in the old company, with a limitation of twenty-one days, or a further time to be determined, within which he must make his claim.

Lindley M.R., after reading the provisions in question, says (2): "Pausing there for a moment, it is in practice and as a matter of business impossible to work out arrangements of this kind unless a time for making and sending in such claims is fixed." By "arrangements of this kind" the Master of the Rolls means arrangements for distributing this class of assets among the members of the company. "A time which is so short as to be unreasonable would be a ground for objecting

(1) [1899] 2 Ch. 616. (2) [1899] 2 Ch. 624, 625.

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

to the scheme; but without some kind of limit it is practically impossible to work these schemes through. In fact, it has been decided, not now for the first time, but on previous occasions, that there is no objection to such a provision; and when one bears in mind that, if no time were fixed, there might be disputes as to what is a reasonable time, it is obvious that the mere fact that the time is fixed is not only no objection to the scheme, but removes any objection to it. There is, then, nothing wrong in the scheme so far." Then he refers to the provision putting the shares in the new company which were not allotted at the disposal of the new company, and goes on: "Looking at all these provisions, the substance and effect of the scheme is this: it is a scheme by which the new company takes over the assets of the old company for certain considerations in shares and so on, and one of the considerations is that the shares in the new company which are not taken up by members of the old company by a particular time shall be at the disposal of the new company. It appears to me, I confess, that that is warranted by the section of the Act which I have read. The objection to it is that this is a provision for forfeiting the shares of the members of the old company. Well, in a sense you may use that language; but looking at the substance of the thing, it is saying to every member of the old company, 'You shall have as many shares as you are entitled to in the new company if you take the trouble to ask for them within the time fixed, and if you do not you will be treated as not caring to have them.'" He then refers to a query raised by Lord Esher in *Nicholl* v. *Eberhardt Co.* (1), and points out that Lord Esher was not considering a case like that before him, and his query was not raised as to a question of ultra vires. Romer L.J. says (2): "The benefit he"—that is, the shareholder of the old company—"receives is the right, if he applies within a given time, to call upon the new company to allot him shares partly paid up in the new company in lieu of or in respect of his shares in the old company. Each member of the old company has that right; an equal right is given to all the members of the old company; there is no preference between one shareholder and another, and no distinction between classes."

(1) (1889) 61 L. T. 489; 1 Megone, 402. (2) [1899] 2 Ch. 627.

That language of Romer L.J. supports the contention of the defendants in the present case that the agreement, although it is said to be unequal, does not in fact create inequality. The right of each shareholder is to have his due part of the assets distributed in specie. Romer L.J. says, in a case which is much like the present, that that right is complied with by giving to each shareholder the right to require the shares to be allotted to him and, if he does not require them, allowing the company to deal with them. So far, therefore, in my view, neither upon authority nor upon principle, is the proposed distribution ultra vires. But it is said that there is something contrary to the view I am taking in *Bisgood* v. *Nile Valley Co.* (1) Unfortunately that case is at present only reported in the Times Law Reports, and, it being of course a newspaper report, the authorities upon which the judge acted in giving his decision are not referred to. *Manners* v. *St. David's Gold and Copper Mines, Ld.* (2) is the only case which is referred to, and we do not know what others were cited. But there is a distinction between that case and this, in that that was a case which, as Kekewich J. held, fell rather within the principle of *Manners* v. *St. David's Gold and Copper Mines, Ld.* (2), because provisions were inserted in the agreement for sale, declaring what was to be done with the shares to be distributed, and not leaving the vendor company to deal with them as they thought fit, but binding them by the agreement to deal with them in a way which the learned judge thought improper. I think that was a determining factor in the case, because Kekewich J. begins by saying that, to work out properly the sale under the terms of the memorandum of association, all the shares should be under the control of the liquidator, who would have to realize the shares and divide the proceeds among all the shareholders according to their nominal interests in the company; but that was not the method which the company proposed to follow. Instead of the shares being under the control of the liquidator, the proposal was to allot the shares of the new company direct to the shareholders in the old company. Also the learned judge

(1) 22 Times L. R. 317. Since reported ante, p. 747.

(2) [1904] 2 Ch. 593.

WARRINGTON J.
1906
FULLER v. WHITE FEATHER REWARD, LIMITED.

points out that shareholders who decline to take the new shares were not getting a proper part of the consideration, but only a rateable proportion of the proceeds of sale. That is true in the present case, and so far the remarks of Kekewich J. are in point here. But in this case the shares are not appropriated to any particular shareholder, but are all lumped together, and each shareholder takes a share of that lump; whereas in the case before Kekewich J. there was an appropriation of shares to the several shareholders, and by the scheme they lost that right.

The result is that upon the neat question whether the company are acting ultra vires I must come to the conclusion that they are not. I say nothing as to whether what they are doing is fair or unfair, and I disclaim any intention of expressing an opinion on that point. The motion, therefore, must be refused.

Solicitors: *Greenip, Snell & Co.; Vallance & Co.*

H. C. R.

In re ALFRED MELSON & CO., LIMITED.

BUCKLEY J.

1906

May 1.

[0089 of 1906.]

Company—Winding-up—Petition of Unsecured Creditor—Assets covered by Debentures—Business carried on by Debenture-holders—"Just and Equitable" Ground for Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79.

A creditor of a company recovered judgment against it in an action for goods sold and delivered. On threatening to issue execution the creditor discovered that all the present and future assets of the company were charged by debentures (some of which had been created after the date of his judgment) in favour of debenture-holders who were carrying on the business in the company's name, although no receiver had been appointed. The judgment creditor presented a petition asking that the company might be wound up by the Court, and stating the inability of the petitioner to say positively until after proper investigation whether there would be any surplus of assets after satisfying the debenture-holders. The petition was not supported or opposed by the other unsecured creditors:—

Held, that, assuming that the assets were insufficient to satisfy the debenture-holders, the Court was entitled to say that it was "just and equitable" within the meaning of s. 79 of the Companies Act, 1862, to wind up a company so conducted.

The Court was, moreover, not satisfied on the evidence that there would be nothing for unsecured creditors in the event of winding-up, and ordered the company to be wound up.

A COMPANY called Alfred Melson & Co., Limited, was registered in 1897 with a nominal capital of 10,000*l.*, and at the time of the hearing of the petition mentioned below the paid-up capital was 2507*l.*

The Bradford Dyers Association, Limited, supplied goods to the company, and in December, 1905, recovered judgment against the company for 98*l.* 15*s.* 3*d.* in an action for goods sold and delivered.

On threatening to issue execution against the company the association discovered that all the assets of the company were subject to debentures creating charges on the company's assets, and that the debenture-holders were carrying on the business in

BUCKLEY J.
1906
ALFRED MELSON & Co., LIMITED, *In re.*

the name of the company, although no receiver had been appointed.

The evidence of Mr. S. S. Seal, the company's solicitor, filed in opposition to the petition, disclosed the following facts as to the company's debenture debts:—

In April, 1897, the company had borrowed 3000*l.* on first debentures charged on its undertaking and all its present and future assets, and further secured by a debenture trust deed.

These debentures were in 1901 transferred to F. Baring Gould, who at the same time obtained from the company a third debenture for 300*l.* by way of premium. In the same year second debentures for 2500*l.* were issued to A. Melson. These contained a similar charge, and the second and third debentures were further secured by another trust deed. The 2500*l.* secured by the second debentures was in fact provided, as to 1100*l.* by F. Baring Gould and as to 1400*l.* by Mr. Seal, and all the second debentures were transferred to Mr. Seal.

In March, 1906, prior lien debentures were granted to F. Baring Gould and H. K. Paxton to secure the sum of 1000*l.*, and at the date of the petition the following principal sums, irrespective of interest, were outstanding on the debentures:—

On first debentures	£2700
On second debentures	2500
On the third debenture	300
On the prior lien debentures . . .	1000
Total	£6500

In April, 1906, the association filed a petition against the company, alleging that the petitioner was anxious that the company's affairs should be investigated by an independent person; and that the company was insolvent and unable to pay its debts; and also stating as follows: "Your petitioner is unable to say positively, until after proper investigation, whether there will be a surplus of assets after satisfying any proper claims on the part of the debenture-holders." And the petition prayed that the company might be wound up by the Court. Mr. Seal in his affidavit referred to the last balance-sheet of the company,

and further stated that the company did not possess any property or assets at all outside those which were pledged to the debenture-holders; that the debenture-holders had abstained from appointing a receiver solely out of regard to the interests of the unsecured creditors as distinguished from themselves: that if the 1000*l.* had not been found the company must have stopped its business, and that in that case there would not have been anything for the creditors or sufficient to pay the debenture-holders; and that the business was being carried on at a profit.

Buckmaster, K.C., and *Ashton Cross*, for the petitioner. If the balance-sheet could be relied on, it might be contended that there would be a surplus for the unsecured creditors, and in that case there would be no answer to the petition. But assuming that the assets of the company are insufficient to pay even the debenture-holders in full, that is no answer to the petition where the business of the company is being carried on, not for the purposes for which the company was constituted, but for the benefit of the debenture-holders: *In re Chic, Ld.* (1)

In that case a receiver had been appointed, but here those carrying on the company's business can order goods and incur liabilities in its name, and when the unsecured creditors ask for payment they can obtain the appointment of a receiver and sweep off all the assets: *In re London Pressed Hinge Co.* (2)

Under such circumstances it is "just and equitable" within the meaning of s. 79 of the Companies Act, 1862, that the company should be wound up and wiped out.

Kirby, for the company. There will be nothing for the unsecured creditors if a winding-up order is made at once. The business has certainly not been carried on with a view to or with the effect of deteriorating the assets, and it is in the interests of everybody concerned that an opportunity should be afforded of carrying on the business for a further period.

There were special circumstances in *In re Chic, Ld.* (1) The older cases shew that a winding-up order will not be made where no benefits can accrue from it to the creditors.

(1) [1905] 2 Ch. 345. (2) [1905] 1 Ch. 576.

BUCKLEY J.
1906
ALFRED MELSON & Co., LIMITED, *In re.*

[BUCKLEY J. In *In re St. Thomas' Dock Co.* (1), a large number of debenture-holders and creditors opposed the petition. Is not this a case where the debenture-holders, not the company, are really carrying on the business, and whatever the business produces will, at any rate for a long time, only benefit the debenture-holders?]

For some time they only will benefit, but in the meantime the unsecured creditors can get nothing by putting an end to the business, and ultimately the carrying on of the business may benefit them. I ask that the petition may stand over in order that the wishes of the other creditors may be ascertained.

[BUCKLEY J. Why not wind up the company and let the debenture-holders carry on the business in their own names?]

Buckmaster, K.C., referred to *In re Chapel House Colliery Co.* (2)

BUCKLEY J. This is a company which has a paid-up capital of 2507*l.* and a debt upon debentures—which constitute a charge upon its undertaking and all its assets—to the amount of 6500*l.* The petitioners are creditors for a sum of 98*l.* 15*s.* 3*d.*, in respect of which they recovered judgment against the company on December 1, 1905. Of the debenture debt 1000*l.* was borrowed upon the security of prior lien debentures in March, 1906, that is to say, after the date on which the judgment had been obtained. The company say that if I make a winding-up order there will be nothing to wind up, as the debentures more than exhaust all the assets of the company. I will, for the moment, assume that to be the fact and see how the matter then stands. If that be the fact, it seems to me that, upon the evidence in this case, the company is not really and in substance carrying on business at all, but the business is being carried on by or for the debenture-holders. The company's name is used, but while the goods are ordered and the debts incurred in the company's name the debenture-holders are put in a position to avail themselves of the law to which I called attention in *In re London Pressed Hinge Co.* (3) The company (for it is nominally the

(1) (1876) 2 Ch. D. 116. (2) (1883) 24 Ch. D. 259
(3) [1905] 1 Ch. 576.

company) orders goods and does not pay for them. When the creditor seeks to enforce payment the debenture-holders can at any moment intervene by the appointment of a receiver, take the goods for which payment has not been made, and leave the person who supplied them unpaid. That seems to me to be a state of things which ought not to be allowed to go on. In the case of *In re St. Thomas' Dock Co.* (1), decided by Sir George Jessel in the year 1876, and *In re Chapel House Colliery Co.* (2), decided by the Court of Appeal in the year 1883, the principle was adopted that a creditor who comes for a winding-up order must in general shew that there is some expectation of obtaining payment of something under the order when other creditors oppose the petition and ask that the company may be allowed to go on. But those cases were decided before debentures had reached their modern development. Moreover, I do not think it was ever laid down that, as between the petitioning creditor and the company, the Court was bound, at the instance of the company as distinguished from other creditors of the company, to refuse the order on the ground that it will not be fruitful. What was decided was that there was a discretion in the Court, that the petitioning creditor was not as between himself and other creditors entitled to an order ex debito justitiæ, and that the Court, in dealing with the matter, ought under s. 91 of the Companies Act, 1862, to regard the wishes of the other creditors, and might refuse the order, notwithstanding the fact that the petitioning creditor was left unpaid. I do not think there exists in those cases anything which obliges me to say, particularly in the modern state of facts as regards debentures, that the Court is bound to exercise its discretion by refusing at the instance of the company to make the order, merely upon the ground that the order will not produce anything for the unsecured creditors. That would be to affirm the proposition that the company has used this petitioning creditor so ill as that it ought to be allowed to continue business and create future unsecured creditors who shall be in like position. I think that, under the "just and equitable" clause of s. 79 of the Act of 1862, I am entitled to say that a company conducted under

(1) 2 Ch. D. 116. (2) 24 Ch. D. 259.

BUCKLEY J.

1906

ALFRED MELSON & Co., LIMITED, *In re.*

such circumstances ought not to go on, and that there ought to be a winding-up order.

Moreover, although Mr. Kirby says that the company has no surplus assets for the unsecured creditors, I am not satisfied on the facts that that is the true state of the case. Upon its balance-sheet of December, 1905, there are shewn assets to the extent of nearly 9300*l.*, and debentures to the extent of over 5000*l.* The further prior lien debenture debt of 1000*l.* has arisen since that date. Unless a particular item, "overdraft of Mr. Melson, 3787*l.*," is bad (and there is no evidence that it is bad), there would be or may be assets for payment of something to the unsecured creditors. The evidence that there is not enough is to be found only in certain paragraphs of Mr. Seal's affidavit. I am not satisfied that the order need be barren.

The debentures are held as follows:—A Mr. Baring Gould holds 2700*l.* first debentures, 1100*l.* second debentures, 300*l.* third debenture, and 500*l.* prior lien debentures; 500*l.* prior lien debentures are held by Mr. Paxton, and 1400*l.* second debentures are held by Mr. Seal, the solicitor of the company. The persons for whom this company is carried on are really Mr. Baring Gould, with (to a much smaller extent) Mr. Paxton and Mr. Seal, though whether Mr. Seal holds in his own right I do not know. The persons substantially carrying on the business are not the company, but these persons. In this state of facts I think the order ought to be made, and I therefore make the usual compulsory winding-up order.

Solicitors for the petitioner: *Wynne-Baxter & Keeble, for Banks Newell & Hammond, Bradford.*

Solicitor for the company: *S. S. Seal.*

F. E.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1906, will be as follows:—

In the First Series,
[1906] 1 Ch. [1906] 2 Ch.

In the Second Series,
[1906] 1 K. B. [1906] 2 K. B. [1906] P.

In the Third Series,
[1906] A. C.

INDEX.

ACCOUNTS — Redemption action — Compound interest—Proviso for capitalization of interest in arrear – – – **165**
See MORTGAGE. 2.

ACT OF PARLIAMENT.
See under STATUTE.

ADMINISTRATION—*Intestate's Estate—Statute of Limitations—"Present right to receive the same"—Right to recover by Action at Law—Incapacity to sue Co-executor at Law—Suit in Equity—Law of Property Amendment Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 13.

In 1864 a trust fund, payable to E. M. P. as the administratrix of the intestate appointee of the fund, was paid to E. M. P. and to her husband, G. P., in her right. E. M. P. was beneficially entitled to one moiety of the fund, and the other moiety was payable to E. M. P., G. P., and J. C. C. as the executors of M. C., in whose estate E. M. P. had a life interest. G. P. paid the money into his private banking account, and never accounted for or gave any acknowledgment in respect of it. G. P. died in 1884, J. C. C. in 1886, and E. M. P. in 1903. In an action by the administrator de bonis non of the appointee for a declaration that G. P.'s estate was liable to make good the portion of the fund unaccounted for, the executor of G. P.'s residuary legatee pleaded the statutory bar under s. 13 of the Law of Property Amendment Act, 1860:—

Held, that "a present right to receive" the share, within the 13th section, meant a right in the "person capable of giving a discharge" of recovering payment of the share into his own hands by an action at law, and that inasmuch as J. C. C. could not have sued his co-executors at law, there was, in 1864, no person who had a present right to receive the share in question, and consequently the statute had not run.

Binns v. *Nichols*, (1866) L. R. 2 Eq. 256, approved.

The fact that J. C. C. might, by a suit in equity against his co-executors for the administration of the appointee's estate, have secured to M. C.'s estate the share in question, did not constitute him a person to whom "a present right to receive the same" had accrued, within the meaning of the section. *In re* PARDOE. MCLAUGHLIN *v.* PENNY – **Kekewich J. 265**

ADMINISTRATION—*continued.*

2. —— *Marshalling Assets—Direction for Payment of Debts—Insufficiency of Personal Estate—Pecuniary Legatees and Specific Devisees—Effect of Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 3—*Intention of Testator—Preservation of order in which Assets are applicable.*

Although Part I. of the Land Transfer Act, 1897, has rendered unnecessary an express charge of debts on real estate, it has not affected the application of the doctrine of marshalling in favour of pecuniary legatees where land is devised subject to an express charge of debts, and the personalty is exhausted in paying debts. *In re* KEMPSTER. KEMPSTER *v.* KEMPSTER **Kekewich J. 446**

3. —— *Personal Estate—Intestacy—Lunatic—Advances to Brothers and Sisters—Stipulation as to Hotchpot—Deceased Sister's Children taking by Representation—Statute of Distribution* (22 & 23 *Car.* 2, *c.* 10), *ss.* 6, 7.

A bachelor lunatic died intestate leaving a brother, a sister, and the children of a deceased sister his sole next-of-kin.

The deceased sister had received an advance from the lunatic's property under an order of the Lunacy Court, which order, with her consent, directed that the advance should be taken and considered as part of any share to which she might become entitled in the lunatic's estate at the time of his decease in the event of her surviving him:—

Held, that the deceased sister's children,

ADMINISTRATION—*continued.*

though only taking a share as legally representing their mother, under ss. 6 and 7 of the Statute of Distribution, were not bound to bring the advance into hotchpot.

Proud v. *Turner*, (1729) 2 P. Wms. 560, distinguished.

Lloyd v. *Tench*, (1751) 2 Ves. Sen. 213, 215, explained. *In re* GIST. GIST *v.* TIMBRILL
Swinfen Eady J. 58

4. —— *Probate Action—Costs to come "out of the Estate"—Insufficient Personalty—Liability of Real Estate—Land Transfer Act*, 1897 (60 *&* 61 *Vict. c.* 65), *s.* 1, *sub-ss.* 1, 3; *s.* 2, *sub-s.* 3—*Rules of Supreme Court, Order* LXV., *r.* 14 D—*Practice—Particular Portions of Estate—Costs—Incidence—Direction by Court.*

By the judgment in a probate action pronouncing against the validity of the will of the deceased, who died since the commencement of the Land Transfer Act, 1897, the costs of the plaintiffs propounding the will were ordered to be paid "out of the estate." The personal estate of the deceased proving insufficient:—

Held that, by virtue of Part I. of the Act, the word "estate" now meant the real as well as the personal estate of a person dying since the commencement of the Act, and that under sub-s. 3 of s. 2 the real estate of the deceased was subject to the same liability as his personal estate for the costs in question and must bear those costs.

The Probate Division having acquired jurisdiction over real estate by virtue of Part I. of the Act, the ground upon which the decision in *In re Shaw*, [1894] 3 Ch. 615, was based has disappeared.

It is open to the Court under Order LXV., r. 14 D, to distinguish between various portions of the estate, for instance between realty and personalty, and to impose costs accordingly. If the Court makes no such distinction, the costs are payable out of the entirety of the estate in due order of administration. *In re* VICKERSTAFF. VICKERSTAFF *v.* CHADWICK
Kekewich J. 762

ADMINISTRATOR — Convict—Power to disentail convict's estates tail—Forfeiture
See FELONY. **440**

ADVANCES — Stipulation as to hotchpot — Deceased sister's children taking by representation – – – – **58**
See ADMINISTRATION. 3.

AFFIDAVIT — Company — Winding-up — Petition—Statutory affidavit – – **640**
See COMPANY. 14.

AFTER-ACQUIRED PROPERTY — Covenant to settle wife's — Construction — Estate tail – – – – – – **578**
See SETTLEMENT. 1.

AGENT — Principal and—Receiver and manager—Receiver's remuneration—Priorities
See COMPANY. 7. **365**

ALIMONY—Separation deed—Annuity—Deduction of income tax – – – **768**
See DIVORCE.

ALTERATION—Club rules—Power to alter **480**
See CLUB.

AMALGAMATION — Company — Memorandum of association—Reconstruction – **823**
See COMPANY. 1.

—— Railway company—Dock company—Water—Supply to dock—Ultra vires – **310**
See COMPANY. 6.

AMENDMENT — Patent — Specification — Disclaimer—Pending litigation – **85**
See PATENT. 1.

ANNUITY—Income tax—Deduction of—Separation deed—Alimony – – – **768**
See DIVORCE.

—— Income tax — Duty of trustee to deduct – – – – – **793**
See TRUSTEE. 2.

—— Tenant for life and remainderman—Public-house — Licence — Compensation for non-renewal – – – – **779**
See LICENSING ACTS.

APPOINTMENT—Power of.
See under POWER OF APPOINTMENT.

—— Trustees.
See under TRUSTEE.

APPORTIONMENT — Costs — Re-investment in land – – – – – – **615**
See LANDS CLAUSES ACTS. 1.

ASSETS—Marshalling—Effect of Land Transfer Act – – – – – – **446**
See ADMINISTRATION. 2.

—— Surplus assets—Distribution among shareholders — Bankruptcy of shareholder—Proof – – – – – **1**
See COMPANY. 16.

ATTACHMENT — *Contempt — Disobedience of Order to pay Money—Fiduciary Capacity — Possession or Control — Debtor Executor — Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4.

A debtor who is appointed executor by his creditor, and who proves the will, is deemed in equity to have paid the debt to himself as executor, and to have the money in his possession in a fiduciary capacity as assets belonging to the testator's estate, and, therefore, where an order is made against him in an administration action declaring him accountable for the debt as assets in his hands belonging to the testator and ordering him to pay within a given time, and he makes default, he is liable to attachment under s. 4 of the Debtors Act, 1869; but *semble*, the Court in the exercise of its discretion will not make an order for attachment against him when he is not morally blameworthy in the matter, as where he never had any means available for payment of the debt, or where, being insolvent, he honestly seeks the protection of the Court of Bankruptcy.

Where a debtor executor, who had disobeyed an order of a Court of Equity for payment of the debt, had, since his appointment as executor, means available for payment, but had denuded himself of his property, and filed a petition in

ATTACHMENT—*continued.*
bankruptcy for the purpose of evading payment :—

Held (affirming the decision of Kekewich J.), that the Court had jurisdiction to make an order for attachment against him, and that the order ought to be made.

Dictum of Malins V.-C. in *Metcalfe's Case*, (1880) 13 Ch. D. 815, 820, overruled.

In re Woodward, (1886) 30 Sol. J. 753, explained and distinguished. *In re* BOURNE. DAVEY *v.* BOURNE – – – **C. A. 697**

2. —— *Practice — Process — Attachment—Breach of Trust—Misapplication of Trust Funds—Form of Judgment—Judgment for Recovery of Money — Four-day Order — Rules of Supreme Court*, 1883, *Order XLI., r.* 5 ; *Order XLI., r.* 3.

A judgment that the plaintiff do recover from the defendant a sum of money cannot be supplemented by an order fixing a time for the payment of the money by the defendant.

Therefore where the plaintiff in an action against a trustee for a misapplication of trust funds obtained judgment against him for recovery by the plaintiff from the defendant of a sum of money representing the loss to the trust estate instead of judgment in the usual form for payment of the money to the plaintiff by the defendant :—

Held (reversing the decision of Buckley J.), that the judgment could not be supplemented by a four-day order so as to found a right to issue a writ of attachment against the defendant in default of payment within the stipulated time. *In re* ODDY. MAJOR *v.* HARNESS – **C. A. 93**

3. —— *Trustee—Practice—Contempt — Disobedience of Order to pay Money—Service of Order—Presence when Order was made—Rules of Supreme Court, Order XLI., r.* 5 ; *Order XLIV., r.* 2.

A writ of attachment will not usually be issued against a trustee for disobedience of an order directing him to pay money into Court unless the order has been personally served upon him. The fact that the order was made by consent, and that he was in Court when it was made and initialled one of the briefs, will not make personal service unnecessary unless it is shewn that he is evading service. *In re* TUCK. MURCH *v.* LOOSEMORE – – – **C. A. 692**

BANKRUPTCY — Costs—Solicitor's bill of costs —5*l.* deposit on presentation of bankruptcy petition – – – – **124**
See SOLICITOR.

—— of shareholder—Surplus assets—Distribution among shareholders—Proof – **1**
See COMPANY. 16.

BANKRUPTCY RULES, 1886, rr. 112 (1.), 125, 147 – – – – – – **124**
See SOLICITOR.

BIDDING—Costs of—Sale under direction of Court—Rescission – – – **426**
See VENDOR AND PURCHASER. 6.

BILL OF EXCHANGE—*Book Debt—Receivable Bill—Bill delivered to Bankers to be discounted—Property in Bill—Indorsement.*

By an agreement of February 27, 1905, the plaintiff agreed to sell, and the defendant to purchase, certain shares in a company at a price to be ascertained as thereby provided, including a condition that book debts due to the company should be taken as good at the amounts standing in the company's books. The company received in the ordinary course of business a bill of exchange, which was properly accounted for in their books, and on February 22, 1905, handed it to their bankers to be discounted. On February 28 the bankers credited the company's account with the amount of the bill :—

Held, following *In re Stevens*, [1888] W. N. 110, 116, that the bill, being entered in the books of the company as a receivable bill, was a book debt ; that, inasmuch as it had been handed to the bankers for discount, but had not actually been discounted, it was on February 27 a debt due to the company ; and that it must be accounted for as a book debt in ascertaining the amount of the price to be paid for the shares. DAWSON *v.* ISLE – – **Warrington J. 633**

BOOK—Posthumous letter — Proprietorship of copyright —Right to prevent publication – – – – – – **101**
See COPYRIGHT. 1.

BOOK DEBT —Bill delivered to bankers to be discounted—Property in bill – **633**
See BILL OF EXCHANGE.

BORROWING—Receiver—Indemnity — Priority over debenture-holders – – **497**
See COMPANY. 8.

BREACH OF TRUST.
See under TRUSTEE.

BUILD—Covenant to build—Specific performance – – – – – – **34**
See LEASE.

BUILDING—London, house in—Open contract —Adjoining house—Party-wall notice and award—Non-disclosure – **335**
See VENDOR AND PURCHASER. 4.

—— Party-wall notice—Railway company **508**
See LONDON. 1.

BUILDING SCHEME—*Plan—Implied Representation—Power to Vary—Blocking up Road—Cul-de-sac—Dedication to Public—Public User.*

The plaintiff was the owner of a house built on a plot which formed part of an estate laid out by a building society in accordance with a scheme. On the sale of this plot by the society to the plaintiff's predecessor in title, it was shewn on a plan of the estate as bounded on one side by a vacant space, which though not named in the plan as a road, had been in fact roughly made up by the society as a road. This road ran from the street on which the plaintiff's house fronted to a level crossing on a railway over which there was a private right of way for the benefit of the owners of a field on the opposite side of the line. The building society having acquired the field

BUILDING SCHEME—*continued.*

and released the right of way fenced off the road and sold the site to the defendant's predecessor in title. All the plots on the building estate were conveyed subject to a condition reserving to the building society the power of allowing variations in the plans and conditions. The plaintiff claimed to restrain the defendant from digging up the road on the ground, first, that it was a violation of the building scheme, and secondly, that the road had been dedicated to the public by user :—

Held—(1.) that the plan did not amount to a representation to intending purchasers that the vacant space shewn thereon should always remain vacant ; (2.) that under the power of allowing variations it was competent to the society to allow the defendant to dig up the road ; (3.) that assuming the plaintiff was entitled to try the question of dedication in the absence of the Attorney-General, the road being a cul-de-sac, mere user without more could not constitute a dedication to the public. WHITEHOUSE *v.* HUGH – – – **Kekewich J. 253**

CALLS—Bankruptcy of shareholder—Proof by company for unpaid calls and liability to future calls – – – – – **1**
See COMPANY. 16.

CAPITAL—Reduction of—Paying off capital in excess of company's wants—Procedure.
See COMPANY. 9 – – – **141**

CARRIER—Manchester Corporation Tramways —Ultra vires—Business of common carriers – – – – – **643**
See CORPORATION.

CASES :—

—— *Baggs, In re,* – – [1894] 2 Ch. 416, n.
Followed by C. A. *In re* S. S. B.
[1906] 1 Ch. 712

—— *Bainbridge* v. *Smith,* (1889) 41 Ch. D. 462 474.
Applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE
[1906] 1 Ch. 148

—— *Bear Island Defence Works and Doyle, In re,* [1903] 1 I. R. 164.
Applied by Swinfen Eady J. *In re* LONDON UNITED TRAMWAYS ACT, 1900
[1906] 1 Ch. 534

—— *Bilham, In re* – – [1901] 2 Ch. 169
Distinguished by Farwell J. *In re* FRIEND'S SETTLEMENT
[1906] 1 Ch. 47

—— *Binns* v. *Nichols* (1866) L. R. 2 Eq. 256
Approved of by Kekewich J. *In re* PARDOE – – – **[1906] 1 Ch. 265**

—— *Blasson* v. *Blasson,* (1864) 2 D. J. & S. 665.
Questioned by C. A. VILLAR *v.* GILBEY
[1906] 1 Ch. 583

—— *Bowman* v. *Hyland,* (1878) 8 Ch. D. 588.
Discussed and explained by C. A. *In re* JACKSON & HADEN'S CONTRACT
[1906] 1 Ch. 412

CASES—*continued.*

—— *Bright* v. *Campbell,* (1889) 41 Ch. D. 388
Distinguished by C. A. WRIGLEY *v.* GILL – – – **[1906] 1 Ch. 165**

—— *British Asbestos Co.* v. *Boyd,* [1903] 2 Ch. 439.
Applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE
[1906] 1 Ch. 148

—— *Browne* v. *La Trinidad,* (1887) 37 Ch. D.].
Applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE
[1906] 1 Ch. 148

—— *Browne's Policy, In re* – [1903] 1 Ch. 188
Followed by Swinfen Eady J. *In re* PARKER'S POLICIES – **[1906] 1 Ch. 526**

—— *Buckwell* v. *Berkeley, In re,* [1902] 2 Ch. 596.
Principle of, not applicable. *In re* GRANT, BULCRAIG & CO.
Farwell J. [1906] 1 Ch. 124

—— *Burrowes* v. *Molloy,* (1845) 2 J. & Lat. 521, 526.
Distinguished by Swinfen Eady J. WILLIAMS *v.* MORGAN
[1906] 1 Ch. 804

—— *Charterland Stores and Trading Co., In re,* [1900] 2 Ch. 870.
Dissented from by Warrington J. *In re* AFRICAN FARMS, LD.
[1906] 1 Ch. 640

—— *Cockburn* v. *Edwards,* (1881) 18 Ch. D. 463.
Dictum of Cotton L.J. in, preferred to that of Jessel M.R. in the same case, 18 Ch. D. 456. *See* WRIGLEY *v.* GILL
C. A. [1906] 1 Ch. 165

—— *Cole* v. *Sewell,* (1843) 4 D. & War. 1 ; on appeal, (1848) 2 H. L. C. 186.
Followed by Farwell J. *In re* FRIEND'S SETTLEMENT – – **[1906] 1 Ch. 47**

—— *Compton (Lord)* v. *Oxenden,* (1793) 2 Ves. Jun. 261.
Applicable. *In re* HOLE. DAVIES *v.* WITTS – – **C. A. [1906] 1 Ch. 673**

—— *Crump* v. *Lambert,* (1867) L. R. 3 Eq. 409.
Considered and applied by C. A. RUSHMER *v.* POLSUE & ALFIERI, LD.
[1906] 1 Ch. 234

—— *Davies* v. *Thomas* – [1900] 2 Ch. 462
Followed by C. A. *In re* STUCLEY
[1906] 1 Ch. 67

—— *Ebbetts* v. *Conquest* – [1895] 2 Ch. 377
Referred to by Kekewich J. MOLYNEUX *v.* RICHARD – **[1906] 1 Ch. 34**

—— *Edwards* v. *Martin,* (1856) 25 L. J. (Ch.) 284.
Distinguished by Swinfen Eady J. WILLIAMS *v.* MORGAN
[1906] 1 Ch. 804

—— *Faithfull, In re* – – (1887) 57 L. T. 14
Distinguished by C. A. *In re* BENETT
[1906] 1 Ch. 216

CASES—*continued.*

—— *Fox* v. *Garrett* – – (1860) 28 Beav. 16
Disapproved of by C. A. *In re* BENETT
[1906] 1 Ch. 216

—— *Gooding* v. *Read* – (1853) 4 D. M. & G. 510
Head-note to, corrected by Warrington J. *In re* BLEW [1906] 1 Ch. 624

—— *Grant* v. *United Kingdom Switchback Rys. Co.*, (1888) 40 Ch. D. 135.
Applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE
[1906] 1 Ch. 148

—— *Harrison* v. *Cornwall Minerals Ry. Co.*, (1884) 32 W. R. 748 ; 53 L. J. (Ch.) 596.
Dictum of Kay J. in, followed by Farwell J. *In re* HORNE & SONS, LD.
[1906] 1 Ch. 271

—— *Hastie's Trusts, In re* (1887) 35 Ch. D. 728
Followed by Swinfen Eady J. *In re* LOVELAND – [1906] 1 Ch. 542

—— *Haycraft Gold Reduction and Mining Co., In re*, [1900] 2 Ch. 230.
Distinguished by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE
[1906] 1 Ch. 148

—— *Hilbers* v. *Parkinson* (1883) 25 Ch. D. 200
Followed and approved by C. A. *In re* DUNSANY'S SETTLEMENT
[1906] 1 Ch. 578

—— *Hole, In re. Davies* v. *Witts*, [1905] 2 Ch. 384.
Affirmed by C. A. – [1906] 1 Ch. 673

—— *Hornby, Ex parte* – (1819) Buck, 351
Explained and distinguished by C. A. *In re* WEST COAST GOLD FIELDS, LD.
[1906] 1 Ch. 1.

—— *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson*, (1882) 23 Ch. D. 1.
Applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE
[1906] 1 Ch. 148

—— *Irvine* v. *Union Bank of Australia*, (1877) 2 App. Cas. 366.
Distinguished and applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE – – [1906] 1 Ch. 148

—— *Jackson & Haden's Contract, In re*, [1905] 1 Ch. 603.
Affirmed by C. A. – [1906] 1 Ch. 412

—— *Keatley, Ex parte* (1890) 25 L. R. Ir. 265
Applied by Swinfen Eady J. *In re* LONDON UNITED TRAMWAYS ACT, 1900
[1906] 1 Ch. 534

—— *Kidman* v. *Kidman*, (1871) 40 L. J. (Ch.) 359, 360.
Observations of Malins V.-C. in, disapproved of by C. A. *In re* EDWARDS
[1906] 1 Ch. 570

—— *Kingston-upon-Hull Dock Co.* v. *Browne*, (1831) 2 B. & Ad. 43.
Discussed and distinguished by C. A. ASSHETON SMITH *v.* OWEN
[1906] 1 Ch. 179

—— *Langmead's Trusts, In re*, (1855) 20 Beav. 20 ; affirmed on appeal, 7 D. M. & G. 353.
Applied by Farwell J. *In re* BOURNE
[1906] 1 Ch. 113

—— *Liverpool Improvement Act, In re*, (1868) L. R. 5 Eq. 282.
Applied by Swinfen Eady J. *In re* LONDON UNITED TRAMWAYS ACT, 1900
[1906] 1 Ch. 534

—— *Lloyd* v. *Tench* (1751) 2 Ves. Sen. 213, 215
Explained by Swinfen Eady J. *In re* GIST – – – [1906] 1 Ch. 58

—— *Lloyd and North London Railway (City Branch) Act*, 1861, [1896] 2 Ch. 397.
Applied by Swinfen Eady J. *In re* LONDON UNITED TRAMWAYS ACT, 1900
[1906] 1 Ch. 534

—— *London and South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch. D. 562, 583.
Referred to by C. A. *In re* NISBET & POTTS' CONTRACT – [1906] 1 Ch. 386

—— *London County Council* v. *Attorney-General*, [1902] A. C. 165.
Applied by Warrington J. ATTORNEY-GENERAL *v.* MERSEY RY. CO.
[1906] 1 Ch. 811

—— *Loring* v. *Thomas* (1861) 1 Dr. & Sm. 497
Distinguished by Joyce J. *In re* GORRINGE – – [1906] 1 Ch. 319

—— *Lucena* v. *Lucena* – (1877) 7 Ch. D. 255
Discussed by Farwell J. *In re* FRIEND'S SETTLEMENT
[1906] 1 Ch. 47

—— *Manners* v. *St. David's Gold and Copper Mines, Ld.*, [1904] 2 Ch. 593.
Applied by Kekewich J. BISGOOD *v.* NILE VALLEY CO. – [1906] 1 Ch. 747

—— *Metcalfe's Case* (1880) 13 Ch. D. 815, 820
Dictum of Malins V.-C. in, overruled by C. A. *In re* BOURNE [1906] 1 Ch. 697

—— *Montefiore* v. *Guedalla* – [1903] 2 Ch. 723
Considered by Kekewich J. *In re* SAMPSON – – [1906] 1 Ch. 435

—— *Nisbet & Potts' Contract, In re*, [1905] 1 Ch. 391.
Affirmed by C. A. – [1906] 1 Ch. 386

—— *Occleston* v. *Fullalove*, (1874) L. R. 9 Ch. 147.
Followed by Swinfen Eady J. *In re* LOVELAND – – [1906] 1 Ch. 542

—— *Owen, In re* – – (1889) 23 L. R. Ir. 328
Disapproved of by C. A. *In re* BENETT – – [1906] 1 Ch. 216

—— *Proud* v. *Turner* – (1729) 2 P. Wms. 560
Distinguished by Swinfen Eady J. *In re* GIST – – – [1906] 1 Ch. 58

—— *Ridley, In re* – – [1904] 2 Ch. 774
Approved of by C. A. *In re* BENETT
[1906] 1 Ch. 216

CASES—*continued.*

—— *St. Helen's Smelting Co.* v. *Tipping*, (1865) 11 H. L. C. 642.
Considered and applied by C. A. RUSHMER *v.* POLSUE & ALFIERI, LD. [1906] 1 Ch. 234

—— *Salt, In re* – – – [1896] 1 Ch. 117
Discussed by C. A. *In re* S. S. B. [1906] 1 Ch. 712

—— *Sander* v. *Heathfield*, (1874) L. R. 19 Eq. 21.
Distinguished by C. A. *In re* BENETT [1906] 1 Ch. 216

—— *Sayers* v. *Collyer* (1884) 28 Ch. D. 103, 107
Dictum of Baggallay L.J. in, considered by C. A. *In re* R. [1906] 1 Ch. 730

—— *Shaw, In re* – – – [1894] 3 Ch. 615
Considered by Kekewich J. *In re* VICKERSTAFF – – [1906] 1 Ch. 762

—— *Sirdar Rubber Co.* v. *Wallington, Weston & Co.*, [1905] 1 Ch. 451.
Affirmed by C. A. – [1906] 1 Ch. 252

—— *Southern Counties Deposit Bank* v. *Rider*, (1895) 73 L. T. 374.
Applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE [1906] 1 Ch. 148

—— *Stammers* v. *Elliott* (1868) L. R. 3 Ch. 195
Explained and distinguished by C. A. *In re* WEST COAST GOLD FIELDS, LD. [1906] 1 Ch. 1

—— *Stanhope* v. *Manners* – (1763) 2 Eden, 197
Distinguished by Swinfen Eady J. WILLIAMS *v.* MORGAN [1906] 1 Ch. 804

—— *Stevens, In re* – [1888] W. N. 110, 116
Followed by Warrington J. DAWSON *v.* ISLE – – – [1906] 1 Ch. 633

—— *Stevens* v. *Adamson* – (1818) 2 Stark. 422
Followed by Joyce J. CARLISH *v.* SALT [1906] 1 Ch. 335

—— *Strapp v. Bull, Sons & Co.* [1895] 2 Ch. 1
Discussed and distinguished by C. A. *In re* GLASDIR COPPER MINES, LD. [1906] 1 Ch. 365

—— *Sturges* v. *Bridgman* (1879) 11 Ch. D. 852
Considered and applied by C. A. RUSHMER *v.* POLSUE & ALFIERI, LD. [1906] 1 Ch. 234

—— *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502.
Applied by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE [1906] 1 Ch. 148

—— *Taylor's Agreement Trusts, In re*, [1904] 2 Ch. 737.
Distinguished by Warrington J. *In re* NO. 9, BOMORE ROAD [1906] 1 Ch. 359

—— *Theaker's Settled Estates, In re*, Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 332.
Followed by Swinfen Eady J. *In re* POLLOCK – – [1906] 1 Ch. 146

CASES—*continued.*

—— *Thomas* v. *Daw* – (1866) L. R. 2 Ch. 2, n.
Judgment of Kindersley V.-C. in, observed upon by Buckley J. THOMPSON *v.* HAMMERSMITH CORPORATION [1906] 1 Ch. 299

—— *Turner, In re*, (1895) 43 W. R. 153; 13 R. 132.
Followed by Swinfen Eady J. WILLIAMS *v.* MORGAN [1906] 1 Ch. 804

—— *Union Bank of London* v. *Ingram*, (1880) 16 Ch. D. 53.
Distinguished by C. A. WRIGLEY *v.* GILL – – – [1906] 1 Ch. 165

—— *Valletort Sanitary Steam Laundry Co., In re*, [1903] 2 Ch. 654.
Followed by Farwell J. *In re* BOURNE [1906] 1 Ch. 113

—— *Victorian Daylesford Syndicate, Ld.* v. *Dott*, [1905] 2 Ch. 624.
Followed and approved by C. A. BONNARD *v.* DOTT – [1906] 1 Ch. 740

—— *Villar* v. *Gilbey* – – [1905] 2 Ch. 301
Reversed by C. A. – [1906] 1 Ch. 583

—— *Waite* v. *Littlewood* (1872) L. R. 8 Ch. 70
Discussed by Farwell J. *In re* FRIEND'S SETTLEMENT – – [1906] 1 Ch. 47

—— *Walker* v. *Mower* – (1852) 16 Beav. 365
Approved of by C. A. *In re* EDWARDS [1906] 1 Ch. 570

—— *Walker and Oakshott's Contract, In re*, [1901] 2 Ch. 383.
Overruled on one point by C. A. *In re* JUDD AND POLAND AND SKELCHER'S CONTRACT – [1906] 1 Ch. 684

—— *Walters, In re* – (1845) 9 Beav. 299
Referred to by Farwell J. *In re* GRANT, BULCRAIG & CO. [1906] 1 Ch. 124

—— *Watkins, In re* – [1896] 2 Ch. 336
Explained and distinguished by C. A. *In re* WHALLEY – [1906] 1 Ch. 565

—— *Watson, In re* – – [1902] W. N. 192
Not followed by Warrington J. *In re* BLEW – – [1906] 1 Ch. 624

—— *West Coast Gold Fields, Ld., In re. Rowe's Trustee's Claim* – [1905] 1 Ch. 597
Affirmed by C. A. [1906] 1 Ch. 1

—— *Wise, In re* – – [1896] 1 Ch. 281
Not followed by Warrington J. *In re* BLEW – – [1906] 1 Ch. 624

—— *Woodward, In re* – (1886) 30 Sol. J. 753
Explained and distinguished by C. A. *In re* BOURNE – [1906] 1 Ch. 697

—— *Wrangham's Trust, In re*, (1860) 1 Dr. & Sm. 358
Referred to by C. A. *In re* EDWARDS [1906] 1 Ch. 570

—— *Wrigley* v. *Gill* – [1905] 1 Ch. 241
Affirmed by C. A. – [1906] 1 Ch. 165

CASES —*continued.*

—— *Wyoming Syndicate, In re State of*, [1901] 2 Ch. 431.
Distinguished by Swinfen Eady J. BOSCHOEK PROPRIETARY CO. *v.* FUKE [1906] **1 Ch. 148**

—— *X., In re* – – – [1894] 2 Ch. 415
Discussed by C. A. *In re* S. S. B. [1906] **1 Ch. 712**

CERTIFICATE — Company—Shares—Priority—Negligence—Possession of certificates
See COMPANY. 10. **659**

CHAIRMAN — Voting — "Personally or by proxy"—Power of chairman to direct manner of taking – – – **331**
See COMPANY. 12.

CHARGING ORDER—Debenture-holder's action —Plaintiff's costs – – – **271**
See COMPANY. 2.

CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY ACT—Party-wall notice—Station – – – – – **508**
See LONDON. 1.

CHILDREN—Illegitimate children—Class gift—Future children—Uncertainty—Public policy – – – – – **542**
See WILL. 2.

CLASS—Children—Illegitimate children—Indication of intention—Class gift—Future children—Uncertainty – – **542**
See WILL. 2.

—— Contingent or vested—Gift over on death "without leaving any children"—Intestacy – – – – **570**
See WILL. 3.

—— Gift to children as a class—Substitutional gift to issue—Issue of parent dead at date of will – – – – **319**
See WILL. 4.

CLUB — *Rules — Powers to Alter — Fundamental Objects—General Meeting—Resolution—Validity.*

The H. Club was formed in 1868 with express powers to alter any of its rules by the resolution of a prescribed majority. The rules were accordingly altered from time to time, and the subsisting rule 2 read thus: "The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports surrounded with such accessories and so situated as to render it an agreeable country resort." Pigeon-shooting had been carried on at the club from its commencement down to 1905, prizes being given and competitions arranged by the committee. Polo and other sports had also been carried on for a shorter period. At a general meeting of the club held in May, 1905, a resolution was passed by the requisite majority that as from December 31, 1905, pigeon-shooting should be discontinued at the club. The minority

CLUB—*continued.*

brought an action against the trustees and committee for a declaration that the resolution was null and void, insisting that it was not competent to the majority, under the guise of altering the rules of the club, to change its fundamental object:—

Held, that there was no fundamental rule that any particular sport should be provided; that what had been done was within the power of altering the rules; and that consequently no such declaration as was asked for ought to be made.

There is no rule of law that requires any company or other association to fulfil each and every separate purpose for which it was originally formed. THELLUSSON *v.* VISCOUNT VALENTIA **Joyce J. 480**

COMMITTEE —Power of sale—Land vested in lunatic as tenant for life – – **712**
See LUNACY. 1.

COMPANIES (WINDING-UP) RULES, 1903, rr. 29, 200 – – – – – **640**
See COMPANY. 14.

COMPANY — *Amalgamation — Memorandum of Association — Reconstruction under power in Memorandum—Sale of Assets for Shares in new Company—Partly-paid Shares—Distribution of Consideration—Offer of Shares to all Shareholders.*

One of the objects of a company was to sell and dispose of its property for such consideration as it thought fit, and in particular for shares fully or partly paid up, and to divide the consideration amongst the members of the company. This power was to be exercisable either in view of a winding-up of the company or not. Another object was to distribute any of the assets of the company among the members of the company.

The company agreed to sell its assets and undertaking to another company. By the agreement the vendor company was to be wound up; part of the consideration was to consist of partly-paid shares to be allotted to the vendor company or its nominees. The vendor company were within two calendar months to find people to take up these shares, and if any of them were not taken up they were to be at the disposal of the purchasing company, and the vendor company was not to be liable to take them up itself. Resolutions were passed and confirmed at meetings of the vendor company to wind up that company voluntarily, and that the liquidator should offer the new shares to the members at the rate of one such share for each share held by the members.

By the amalgamation scheme it was provided that the liquidator should sell shares which were not accepted by the shareholders and distribute the net proceeds of sale among such members. A shareholder in the vendor company objected to these proposals:—

Held, that the proposed scheme of reconstruction was within the powers conferred by the memorandum, and ought to be allowed to proceed. FULLER *v.* WHITE FEATHER REWARD, LIMITED – – – **Warrington J. 823**

2. —— *Charging Order—Debenture-holder's Action — Surplus Assets — Plaintiff's Costs—Difference between Party and Party and Solicitor and Client Costs—Plaintiff unable to Pay such Difference—Plaintiff's Solicitor's Costs, Charges and Expenses—Receiver's Costs—Property Recovered or Preserved—Charging Order—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Form of Order—Practice.*

In a debenture-holder's action a receiver was appointed, and the same solicitor acted for the plaintiff and for the receiver. In the course of realizing the estate proceedings were taken at home and abroad with the sanction of the Court, and the solicitor was employed by the receiver for these purposes. In the result property was recovered or preserved, and the funds paid into Court were sufficient to pay all the debenture-holders in full and to leave a large surplus for the liquidator of the company. The plaintiff being unable to pay the difference between party and party and solicitor and client costs of the action :—

Held, that the solicitor was entitled to a charging order for such difference upon so much of the funds as belonged to the debenture-holders.

Dictum of Kay J., in *Harrison* v. *Cornwall Minerals Ry. Co.*, (1884) 32 W. R. 748 ; 53 L. J. (Ch.) 596, followed :—

Held, further, that the solicitor was also entitled to a charging order upon the balance of the funds that would be payable to the liquidator for his costs of recovering and preserving assets at home and abroad, which really were part of the receiver's costs of administration and might have been included in his accounts. *In re* W. C. HORNE & SONS, LIMITED. HORNE *v.* W. C. HORNE & SONS, LIMITED – **Farwell J. 271**

3. —— *Debenture-holders' Action—Property in Jeopardy—Practice — Motion for Judgment on Admissions in Pleadings—Immediate Sale—Form of Order—Rules of Supreme Court, Order* LI., *r.* 1 B.

In a debenture-holder's action, when the property comprised in debentures is in jeopardy, an immediate sale will be ordered under the Rules of the Supreme Court, Order LI., r. 1 B, on motion for judgment on admissions in the pleadings, but, unless all the debenture-holders subsequent to the plaintiffs are parties to the action, the order will be for sale with the approbation of the judge, so that the absent debenture-holders may be brought in in chambers on the application to approve the conditional contract for sale. *In re* CRIGGLESTONE COAL COMPANY. STEWARD *v.* CRIGGLESTONE COAL COMPANY

Swinfen Eady J. 523

4. —— *Directors—Qualification—Shares held "in his own Right"—Shares held as Liquidator of another Company—Income Tax on Directors' Fees—General Meeting convened by de facto Directors—Validity of Resolutions — Ratification of Acts contrary to Articles—No Alteration of Articles—Special Business—Notice.*

The qualification of a director being the holding of 250 shares in his own right, F. was registered as "F. liquidator of the H. company" with a holding of 500 shares :—

Held, that he was not qualified to be a director.

Bainbridge v. *Smith*, (1889) 41 Ch. D. 462, 474, and *Sutton* v. *English and Colonial Produce Co.*, [1902] 2 Ch. 502, applied.

Apart from special provision in the articles directors are not entitled to their fees free of income tax.

The resolutions of a general meeting convened by de facto directors are not invalidated by any irregularity in the constitution of the board.

Browne v. *La Trinidad*, (1887) 37 Ch. D. 1 ; *Grant* v. *United Kingdom Switchback Rys. Co.*, (1888) 40 Ch. D. 135 ; *British Asbestos Co.* v. *Boyd*, [1903] 2 Ch. 439, and *Southern Counties Deposit Bank* v. *Rider*, (1895) 73 L. T. 374, applied.

In re Haycraft Gold Reduction and Mining Co., [1900] 2 Ch. 230, and *In re State of Wyoming Syndicate*, [1901] 2 Ch. 431, distinguished.

Articles fixing the qualification and remuneration of directors being binding on the company as well as the directors, the company cannot ratify an act of the directors in contravention of such articles without first altering them by special resolution.

Imperial Hydropathic Hotel Co., *Blackpool* v. *Hampson*, (1882) 23 Ch. D. 1, applied.

Irvine v. *Union Bank of Australia*, (1877) 2 App. Cas. 366, distinguished.

The notice convening a general meeting stated that it would be held for the purpose of receiving the directors' report, and the election of directors and auditors. The directors' report sent therewith mentioned certain special business not referred to in the notice, viz., the ratification of the board's previous election of R. as a director :—

Held, that the notice and report together were sufficient notice of this special business.

Irvine v. *Union Bank of Australia*, 2 App. Cas. 366, 375, applied. BOSCHOEK PROPRIETARY COMPANY, LIMITED *v.* FUKE

Swinfen Eady J. 148

5. —— *Memorandum of Association—Power to Sell Undertaking for Shares in another Company and Distribute same in Specie—Reconstruction — Proposed Sale of Undertaking for partly-paid Shares — Voluntary Liquidation—Option to Members of old Company to take up New Shares—Time Limit for exercising Option—Realization of rejected Shares — Scheme for Distribution of Proceeds of Realization among Dissentients — Unfairness — Injustice — Ultra vires.*

A company was empowered by its memorandum of association to sell its undertaking for shares in any other company, and to distribute any of the property of the company among the members in specie. Part of its nominal capital had been issued and was fully paid. The company was in need of further capital, and, being unable to place its unissued shares, a scheme for reconstruction was prepared, providing for the

COMPANY—*continued.*

sale of the undertaking and assets of the company to a new company in consideration (inter alia) of partly-paid shares in the new company of the same number and nominal amount as the fully-paid shares in the old company, and that if the old company should go into liquidation before the shares were allotted, every member of the old company in respect of each share therein held by him was to be entitled to claim an allotment to himself of one partly-paid share in the new company. A time limit was fixed within which members of the old company were to exercise their option to claim such an allotment; and with regard to the proportion of the shares in the new company which members of the old company should be entitled to claim, but should not claim within the time limit, the liquidator was to sell the same in such manner as he in his absolute discretion should think fit, and the net proceeds of sale were to be distributed rateably in accordance with their rights and interests among the members who had not so claimed. This scheme was embodied in a draft agreement between the two companies, and a resolution adopting and authorizing the directors to enter into the agreement with the new company when formed was duly passed. On a motion by two dissentient members to restrain the company from acting on the resolution :—

Held, that the agreement was a device for compelling shareholders of the old company either to subscribe further capital or else to accept a share of the proceeds of sale of the unclaimed shares in the new company to be ascertained under a scheme of distribution which was likely to be unfair and work injustice to the dissentient members, and was, at any rate, not part of the bargain under which they had originally subscribed for their shares, and that the agreement was ultra vires.

Manners v. *St. David's Gold and Copper Mines, Ld.*, [1904] 2 Ch. 593, applied. BISGOOD *v.* NILE VALLEY COMPANY, LIMITED

Kekewich J. 747

6. —— *Powers—Ultra Vires—Railway Company—Dock Company—Amalgamation—Water obtained from Land acquired for Purposes of Railway—Supply to Dock—North Eastern Railway (Hull Docks) Act*, 1893 (56 *&* 57 *Vict. c. cxcviii.*), *ss.* 4, 7 (*i.*) (*iv.*).

The undertaking of a dock company was amalgamated with that of a railway company by a special Act of Parliament, which provided that the undertakings so amalgamated should constitute one undertaking and be the undertaking of the railway company. Previous to the amalgamation the dock company had been supplied with water by the corporation of K. After the amalgamation the railway company ceased to take the water of the corporation and supplied the dock with water which they obtained from wells or springs upon land originally acquired by them for the purposes of their railway. In an action against the company by the Attorney-General at the relation of the corporation :—

Held, that in the absence of any prohibition in the amalgamating Act, there was nothing

COMPANY—*continued.*

illegal or ultra vires in what the defendants were doing. ATTORNEY-GENERAL *v.* NORTH EASTERN RAILWAY COMPANY **Joyce J. 310**

7. —— *Receiver—Debenture-holders' Action—Receiver and Manager—Preservation of Assets—Orders giving Receiver and Manager leave to borrow and create First Charge on Assets—Loans by Plaintiff—Contract by Receiver and Manager—Principal or Agent—First Charges by Deed—Realization — Insufficient Assets — Receiver's Remuneration—Costs of Preservation and Realization—Priorities—Form of Borrowing and Charging Order—Limited Company.*

Where advances for the preservation of a limited company's assets are made to a receiver and manager by a party to a debenture-holders' action under an order of Court which directs that the sums advanced shall be a first charge on the assets in priority to the debenture-holders, the receiver and manager is nevertheless entitled to take his costs and expenses properly incurred out of the assets in priority to the sums advanced, if it appears that the true bargain was that the assets should be realized by the receiver and manager for the benefit of all concerned. *Strapp* v. *Bull, Sons & Co.*, [1895] 2 Ch. 1.

But whether the same rule applies where the person making the advance is a stranger to the action, *quære*.

An order was made in a debenture-holders' action against a mining company appointing a receiver and manager. Successive orders were then made on the application of the plaintiffs giving the receiver and manager liberty to borrow, on the security of first charges to be created by him, certain sums of money for the purpose of preserving the company's property and carrying on the business. The receiver and manager borrowed the money from the plaintiffs themselves on the security of deeds executed by him and creating first charges in their favour on the property of the company comprised in the debentures. By each of those charges the receiver and manager expressly stipulated that he should not be personally liable to repay the sums advanced out of his own moneys; but he made no express reservation of his right to be indemnified out of the assets in respect of his costs and expenses properly incurred. He then continued to carry on the company's business, but it proved a failure, and he eventually realized the assets, but the proceeds were insufficient to satisfy both his costs and expenses (including his remuneration allowed by the Court) and also the plaintiffs' charges :—

Held by the Court of Appeal (affirming Joyce J.) that, inasmuch as, in the circumstances, the receiver and manager had acted in the preservation and realization of the assets for the benefit of everyone concerned, he was entitled to indemnity out of the assets in priority to the plaintiffs and all other persons for whose benefit he had so acted.

Strapp v. *Bull, Sons & Co.*, discussed and distinguished.

Per Vaughan Williams L.J. : A receiver and manager, although appointed by the Court, and for the benefit of the debenture-holders, is not

COMPANY—*continued.*

the agent to contract, either of the Court or of anybody else, but is a principal.

An order in a debenture-holder's action giving the receiver liberty to borrow money for the preservation of the property comprised in the debentures, and to charge the same on the property, should expressly state whether the charge is to be subject to or free from the receiver's right to indemnity. *In re* GLASDIR COPPER MINES, LIMITED. ENGLISH ELECTRO-METALLURGICAL COMPANY, LIMITED *v.* GLASDIR COPPER MINES, LIMITED - - **C. A. 365**

8. —— *Receiver and Manager—Authority to borrow Limited Sum for General Purposes of the Business — Limit exceeded — Indemnity—Priority over Debenture-holders.*

Orders were made in a debenture-holders' action appointing a receiver and manager, and authorizing him to borrow 3000*l.* for the general purposes of the business, the sum to be a first charge on the assets. The company was ordered to be wound up. The manager carried on the business and incurred debts beyond the 3000*l.*, but made no further application for leave to raise money. He retired from his office, and the plaintiffs in the action applied for a declaration that he was not entitled to any indemnity in respect of liabilities incurred beyond the 3000*l.*, or that if he was so entitled he had by his conduct forfeited his rights :—

Held, that the order authorizing him to borrow for the general purposes of the business had not deprived the manager of his right to be indemnified out of the assets ; that if without any application to the Court he had incurred further liabilities he would only be entitled to be indemnified in respect of them so far as he could shew that having regard to all the circumstances he was justified in incurring them without leave ; that this must be separately determined in each particular case ; and that it would not be enough for him to shew that the further liabilities had been incurred bona fide and in the ordinary course of business. *In re* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED. HALIFAX JOINT STOCK BANKING COMPANY, LIMITED *v.* BRITISH POWER TRACTION AND LIGHTING COMPANY, LIMITED
Warrington J. 497

9. —— *Reduction of Capital — Paying off Capital in Excess of Company's Wants—Procedure—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 15—*Companies Act*, 1877 (40 *&* 41 *Vict. c.* 26), *s.* 3.

Where the Court is asked to confirm a reduction of a company's capital which is to be effected by paying off capital in excess of the wants of the company, and the Court upon hearing the petition is satisfied that the reduction ought to be confirmed, the proper procedure is to make the order confirming the reduction and then allow the further hearing of the petition to stand over until evidence has been produced that the capital to be paid off has actually been returned to the shareholders, and when this has been done to post-date the order confirming the reduction and approving a minute shewing with respect to the capital, as altered by the order, the particulars

COMPANY—*continued.*

required by s. 15 of the Companies Act, 1867, and s. 4 of the Companies Act, 1877.

The Court cannot make the order approving the minute stating the reduced capital until the capital has in fact been reduced by the repayment.

It is sufficient if the minute states the result of what has been done without shewing how that result has been brought about.

Form of minute.

Observations as to the form of minute where the capital is returned on the footing of its being subject to be recalled.

In re CALGARY AND EDMONTON LAND COMPANY - - - - **Buckley J. 141**

10. —— *Shares — Equitable Title — Right to Registration — Conflicting Equities—Priority — Negligence — Possession of Certificates — Distringas—Lien.*

The owner of shares in a company executed an assignment of all his property to the plaintiffs as trustees for his creditors. The plaintiffs applied to the debtor for the certificates of the shares, but were unable to obtain them, whereupon they gave notice to the company of the assignment. The debtor afterwards through his brokers, C. & Co., sold the shares on the Stock Exchange, executed a transfer, and received the purchase-money. The company, notwithstanding the notice, entered the purchaser's name on the register as holder of the shares, but subsequently removed her name from the register and refused to issue certificates. At the request of the purchaser C. & Co. provided her with other shares in the company, and then claimed to be entitled to the shares sold on behalf of the debtor. In an action by the plaintiffs for a declaration that they were entitled to the shares :—

Held, that any lien which C. & Co. might have upon the shares was only upon the debtor's interest, which was subject to the right of the plaintiffs ; and that the plaintiffs, not having been guilty of any negligence to deprive them of their equity, were entitled to be registered as owners of the shares. PEAT *v.* CLAYTON
Joyce J. 659

11. —— *Shares—Transfer—Blank Transfer—Mortgage—Filling in Blank by Mortgagee—Refusal to Register—Implied Obligation of Transferor not to hinder Registration—Derogation from Grant—Damages.*

Upon a transfer for value of shares in a limited company the transferor is under an implied obligation, arising from the relation of grantor and grantee constituted between the parties by the transfer, not to prevent or delay the registration of the transferee as owner of the shares.

W. executed a transfer in blank of certain shares in a mining company of which he was the registered owner, and handed over the blank transfer and the share certificate to H., with authority to raise money upon them for H.'s own use. At H.'s request the plaintiff obtained from a bank a temporary loan to himself on the security of the blank transfer and share certificate, and paid over the money to H. upon H. undertaking to repay the loan and authorizing

COMPANY—*continued.*

the transfer of the shares to the bank or their nominee in default of payment. Default having been made in payment by the plaintiff and by H., who absconded, the bank, with the plaintiff's concurrence, filled in the plaintiff's name in the blank transfer, and the plaintiff executed the transfer, under circumstances which precluded W. from asserting that the transfer was unauthorized. The transfer having been lodged at the company's offices for registration, W. put a stop on the registration. The shares subsequently fell in value :—

Held, that W. was under an implied obligation to the plaintiff not to delay registration, and that the plaintiff as mortgagor had a sufficient interest in the shares to entitle him to claim damages for the breach of that obligation. HOOPER *v.* HERTS
C. A. 549

12. —— *Voting—"Personally or by Proxy"—Poll—Power of Chairman to direct Manner of Taking—Polling Papers—Invalidity.*

The articles of a company provided in the ordinary way for votes being given either personally or by proxy, the appointment of proxies, &c., but that if a poll was demanded it should be taken "in such manner and at such time and place as the chairman of the meeting directs." At a general meeting of the company, a resolution having been lost upon a show of hands, the chairman demanded a poll and directed that it should be taken by means of polling papers signed by the members and delivered at the offices of the company on or before a fixed day and hour :—

Held, that, having regard to the terms of the articles, such a mode of taking the poll was unauthorized and invalid. MCMILLAN *v.* LE ROI MINING COMPANY – – **Joyce J. 331**

13. —— *Winding-up—Contract to sell Assets—Leaseholds—Omission to Assign—Dissolution of Company—Appointment of New Trustee—Vesting Order—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 25, *sub-s.* 1, *and s.* 26.

By an assignment of September, 1890, leaseholds became vested in a limited company for the residue of a term of ninety-nine years. In 1896 this company went into voluntary liquidation, and its assets were transferred to a new company ; the purchase-money was paid, the new company was let into possession, but by inadvertence no assignment of the leaseholds was executed. The old company having become automatically dissolved under s. 143 of the Companies Act, 1862, a petition was now presented by the new company under the Trustees Act, 1893, asking for the appointment of a named person, pursuant to s. 25, to be a trustee of the leaseholds in the place of the old company, and for a vesting order :—

Held, that as it was clearly expedient to appoint a new trustee, the Court was justified in making the order asked for by the petition.

In re TAYLOR'S AGREEMENT TRUSTS, [1904] 2 Ch. 737, distinguished. *In re* NO. 9, BOMORE ROAD – – – – **Warrington J. 359**

14. —— *Winding-up—Petition—Evidence in Support—Statutory Affidavit—Defect or Irregularity—Companies (Winding-up) Rules*, 1903, *rr.* 29, 200.

Rule 29 of the Companies (Winding-up) Rules, 1903, which provides that a petition for winding up a company shall be verified by an affidavit made by the petitioner, is merely directory as to the kind of affidavit to be accepted as prima facie evidence of the statements in the petition. The Court will, therefore, in a proper case, accept the affidavit of the petitioner's attorney or agent, particularly where it is satisfied that the material facts are more within the knowledge of the deponent than of the petitioner himself.

In re CHARTERED STORES AND TRADING CO., [1900] 2 Ch. 870, dissented from.

In re AFRICAN FARMS, LIMITED
Warrington J. 640

15. —— *Winding-up—Petition of Unsecured Creditor—Assets covered by Debentures—Business carried on by Debenture-holders—"Just and Equitable" Ground for Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79.

A creditor of a company recovered judgment against it in an action for goods sold and delivered. On threatening to issue execution the creditor discovered that all the present and future assets of the company were charged by debentures (some of which had been created after the date of his judgment) in favour of debenture-holders who were carrying on the business in the company's name although no receiver had been appointed. The judgment creditor presented a petition asking that the company might be wound up by the Court, and stating the inability of the petitioner to say positively until after proper investigation whether there would be any surplus of assets after satisfying the debenture-holders. The petition was not supported or opposed by the other unsecured creditors :—

Held, that, assuming that the assets were insufficient to satisfy the debenture-holders, the Court was entitled to say that it was "just and equitable" within the meaning of s. 79 of the Companies Act, 1862, to wind up a company so conducted.

The Court was, moreover, not satisfied on the evidence that there would be nothing for unsecured creditors in the event of winding-up, and ordered the company to be wound up.

In re ALFRED MELSON & CO., LIMITED
Buckley J. 841

16. —— *Winding-up—Surplus Assets—Distribution among Shareholders—Bankruptcy of Shareholder—Proof by Company for unpaid Calls and Liability to future Calls—Receipt of Dividend—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 133.

The holder of 1*l.* shares in a limited company, on which 10*s.* per share had been paid, became bankrupt, and the company proved in the bankruptcy for a call of 1*s.* per share, which had been made just before the bankruptcy, and for the bankrupt's liability in respect of the uncalled 9*s.* per share. The proof was admitted, and the trustee in the bankruptcy paid a dividend of 1*s.* 6*d.* in the pound. It was expected that a

COMPANY—*continued.*

further dividend of 1*s.* 6*d.* in the pound would be paid. The company went into voluntary liquidation, and, after satisfying its debts and liabilities, there remained surplus assets in the hands of the liquidator :—

Held, that the bankrupt's shares could not by reason of the proof in the bankruptcy be treated as fully paid shares for the purpose of the distribution of the surplus assets, but that the holders of the other shares, which were in fact paid up in full, were alone entitled to share in the surplus assets until the amount paid on their shares respectively was reduced to that which had been in fact paid on the bankrupt's shares.

Decision of Buckley J., [1905] 1 Ch. 597, affirmed.

Ex parte Hornby, (1819) Buck, 351; and *Stammers* v. *Elliott*, (1868) L. R. 3 Ch. 195, explained and distinguished.

In re WEST COAST GOLD FIELDS, LD. ROWE'S TRUSTEE'S CLAIM – – **C. A. 1**

—— Costs—Liquidator—Taxation – – **491**
See COSTS.

—— Railway company.
See under RAILWAY.

—— Will — Construction — "Company" — Investments.
See WILL. 8.

COMPENSATION—Conditions of sale—Misdescription—Absence of title to mines —Compensation – – – **412**
See VENDOR AND PURCHASER. 2.

CONDITION—Mortgage — Foreclosure — Conditions of proviso for redemption—Interest – – – – – **804**
See MORTGAGE. 1.

—— Patent—Infringement—Purchase without notice of condition – – – **605**
See PATENT. 4.

—— Requiring resettlement—"Hereditaments" —Money held upon trust for investment in land – – – – – **120**
See WILL. 5.

CONDITIONS OF SALE—Requisition on title—Arbitrary exercise of power to rescind contract – – – – – **596**
See VENDOR AND PURCHASER. 1.

—— Right to rescind if objection insisted on—Misdescription — Absence of title to mines—Compensation – – **412**
See VENDOR AND PURCHASER. 2.

—— Title—Trust for sale—Leaseholds—Trustee —Sale by way of underlease – **684**
See VENDOR AND PURCHASER. 3.

CONSENT— Leasing powers—Principal mansion house—Consent of trustees – – **11**
See SETTLED LAND. 1.

CONTEMPT—Attachment — Debtor executor — Disobedience of order to pay money—Fiduciary capacity – – – **697**
See ATTACHMENT. 1.

CONTEMPT—*continued.*

—— Attachment — Trustee — Disobedience of order to pay money – – – **692**
See ATTACHMENT. 3.

CONTINGENT—Vested or—Class—Gift over on death "without leaving any children" —Intestacy – – – – **570**
See WILL. 3.

CONTINGENT REMAINDER — Settlement — Power of appointment—Perpetuity **783**
See POWER OF APPOINTMENT.

CONTRACT—Money-lender, Contract of unregistered—Validity – – – – – **740**
See MONEY-LENDERS.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONVICT—Administrator — Power to disentail convict's estates tail—Forfeiture – **440**
See FELONY.

COPYHOLDS—Sale of—Death of vendor before completion—Fine on heir's admission
See LANDS CLAUSES ACTS. 3. **534**

COPYRIGHT—*Book—Posthumous Letter—Proprietorship of Copyright—Sender and Recipient—Right to Prevent Publication—Copyright Act*, 1842 (5 *&* 6 *Vict. c.* 45), *s.* 3.

Although at common law the writer of a letter and his legal personal representatives are entitled to prevent its publication, and this is a right of property, in the case of a letter published after the death of the writer the copyright is vested by the Copyright Act, 1842, in the proprietor of the letter itself, *i.e.*, of the paper and the writing upon it. MACMILLAN & CO. *v.* DENT – – – – **Kekewich J. 101**

2. —— *Photographs—Photographs of School —Photographs taken at Author's Risk—Good or valuable Consideration—Fine Arts Copyright Act*, 1862 (25 *&* 26 *Vict. c.* 68), *s.* 1.

The plaintiffs, a firm of photographers, sent a traveller to the proprietors of certain private boys' and girls' schools offering to take photographs of the schools "entirely at their own risk." When leave was given a member of the firm attended the school, and took some photographs of the grounds and exterior of the schools, and the interior of rooms and groups of pupils as the proprietors suggested or permitted. Proofs were afterwards submitted, and some copies were purchased by the proprietors. The proprietors sent copies of some of these photographs to the defendants in order that they might be reproduced and inserted in "P.'s List of Schools," an advertising publication issued by the defendants, and they were reproduced and inserted accordingly. The plaintiffs then registered the copyright of the photographs in their own names as authors, and brought this action against the defendants for an injunction to restrain infringement of their copyright :—

Held, that the permitting the photographer to enter the school and take photographs, on the chance of selling copies to the proprietors, was a "good consideration," and the photographs

COPYRIGHT—*continued.*

must be deemed to have been "made or executed for or on behalf of the proprietors of the schools for a good or valuable consideration" within the meaning of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1, and the copyright, therefore, belonged to the proprietors of the schools, and not to the author of the photographs. STACKEMANN *v.* PATON – **Farwell J. 774**

CORPORATION—*Statutory Powers—Corporation by Charter — General Powers — Tramways — Power to use Tramways for the Purpose of conveying and delivering Parcels — Ultra Vires—Ancillary Business—Business of Common Carriers —Manchester Corporation Tramways Act*, 1899 (62 & 63 *Vict. c. cclix.*)—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50).

By virtue of various provisional orders and private Acts of Parliament the Manchester Corporation had power to use all tramways belonging to or in lease to the corporation, or on which they had power to place or run carriages, "for the purpose of conveying and delivering animals, goods, minerals, or parcels." The corporation worked a large system of tramways, of which they were owners or lessees, extending all over the city and suburbs of Manchester and a considerable surrounding district. They had commenced, or advertised their intention to commence, a general parcels delivery business within and beyond the area covered by their tramways, not confined to parcels and goods carried on their tramways. This action was brought by the Attorney-General, on the relation of Manchester ratepayers, to restrain the carrying on of such a business:—

Held that, under the power given by the Act of 1899, the corporation had power to carry on the business of common carriers upon their tramways, and as ancillary to that business to do all things necessary for the collection and delivery of parcels carried on their tramways. For this purpose they had power to maintain stations or warehouses for receiving and storing parcels or goods, to provide horses, vans, carts, and to employ servants, messengers, and agents for the purpose of collection and delivery. But all these services must be confined to parcels or goods carried or to be carried on the tramways; the corporation had no power to carry on a general parcels delivery business apart from their tramways.

Held, also, that the part of the general business which was in excess of the statutory powers of the corporation must cause some expense to the city funds, and therefore the corporation were prevented by the Municipal Corporations Act, 1882, from carrying it on under their general powers as a corporation by charter. ATTORNEY-GENERAL *v.* MANCHESTER CORPORATION – – – – – **Farwell J. 643**

COSTS — *Company — Liquidator — Taxation of Costs — Disbursements — Professional Charges— Omission from Bill of Items of Costs already taxed — Reduction by One-sixth — Rules of Supreme Court, Order* LXV., *r.* 19 H; *r.* 27, *sub-r.* 38 B—*Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 38.

Under an order that the costs, charges, and expenses of a retiring liquidator should be taxed and provided for, he carried in a bill shewing disbursements and professional charges in separate columns. Amongst the latter he included and gave credit for two bills of party and party costs which had been taxed some time previously and paid to him by a third party. The registrar, on the ground that they had already been paid, struck out these items, with the result that the total amount of the costs was diminished. He proceeded to tax the bill on the footing that it must be treated as a whole and the disbursements and professional charges added together; and he thus reduced it by more than one-sixth. Items for drawing the bill of costs and attending the taxation were accordingly disallowed:—

Held, that the bills for party and party costs were properly included, and ought not to have been struck out of the bill; and that for the purpose of ascertaining whether one-sixth had been taxed off the bill the amount of the professional charges only (omitting the disbursements) must be taken into consideration. *In re* MERCANTILE LIGHTERAGE COMPANY, LIMITED – – – **Warrington J. 491**

—— Bidding, Cost of—Sale under direction of Court—Rescission – – – **426**
See VENDOR AND PURCHASER. 6.

—— Debenture-holder's action—Plaintiff's costs —Charging order – – – **271**
See COMPANY. 2.

—— Land transfer—Costs to come "out of the estate"—Probate action—Insufficient personalty – – – – **762**
See ADMINISTRATION. 4.

—— Lands Clauses Acts—Reinvestment in lands —Apportionment – **615, 619**, n.
See LAND CLAUSES ACTS. 1, 2.

—— Partner appointed receiver — Receiver's remuneration – – – – **55**
See PARTNERSHIP. 2.

—— Patent action—Costs of separate issues— Particulars of objections – – **518**
See PATENT. 2.

—— Receiver and manager—Principal and Agent —Receiver's remuneration—Priorities
See COMPANY. 7. **365**

—— Solicitor's.
See under SOLICITOR.

—— Title—Cost of investigating—Open contract—Party-wall notice and award— Non-disclosure—Rescission – – **335**
See VENDOR AND PURCHASER. 4.

COVENANT—Build, Covenant to—Specific performance – – – – – **34**
See LEASE.

—— Mortgage—Foreclosure—Covenant to pay interest half-yearly—Redemption **804**
See MORTGAGE. 1.

—— Restrictive covenants—Title by adverse possession—Statute of Limitations **386**
See VENDOR AND PURCHASER. 7.

COVENANT—*continued.*

—— To settle wife's after-acquired property—Construction—Estate tail – – **578**
See SETTLEMENT. 1.

CRIMINAL LUNATIC.
See under LUNACY.

CUL-DE-SAC—Dedication to public—Public user—Plan—Implied representation – **253**
See BUILDING SCHEME.

DAMAGES—Company—Shares—Transfer—Refusal to register – – – **549**
See COMPANY. 11.

DEATH—Sale of copyholds—Death of vendor before completion—Fine on heir's admission – – – – – **534**
See LANDS CLAUSES ACTS. 3.

DEBENTURE-HOLDERS AND DEBENTURES—Company.
See under COMPANY.

DEBTORS ACT—Contempt—Disobedience of order to pay money—Fiduciary capacity—Debtor executor – – – **697**
See ATTACHMENT. 1.

DEBTS—Book debt—Property in bill—Indorsement – – – – – **633**
See BILL OF EXCHANGE.

—— Direction for payment of debts—Marshalling assets—Effect of Land Transfer Act – – – – – – **446**
See ADMINISTRATION. 2.

—— Direction to pay debts "except mortgage on Blackacre"—Exoneration – **531**
See WILL. 6.

—— Satisfaction—Legacy – – – **667**
See WILL. 11.

DEDICATION—Cul-de-sac—Dedication to public—Public user—Plan—Implied representation – – – – – **253**
See BUILDING SCHEME.

—— Roadside waste—Presumption—Evidence—Public authorities protection – **342**
See HIGHWAY.

DEEDS—Deposit of title deeds—Partnership real estate—Executor's lien—Notice—Priorities – – – – – **113**
See PARTNERSHIP. 1.

—— Settlement by deed—Construction—"Survivors" read "others" – – **47**
See SETTLEMENT. 2.

DELAY—Roadside waste—Dedication—Action for declaration of title—Public authorities protection – – – – **342**
See HIGHWAY.

DEPOSIT—Forfeiture of—Form of order—Practice – – – – – – **796**
See VENDOR AND PURCHASER. 5.

—— Open contract—Party-wall notice and award—Non-disclosure—Rescission—Costs – – – – – **335**
See VENDOR AND PURCHASER. 4.

DEPOSIT—*continued.*

—— Sums on deposit at banks—Gift of "monies owing to me at the time of my decease"
See WILL. 10. **135**

—— Title deeds—Partnership real estate—Executor's lien—Notice—Priorities
See PARTNERSHIP. 1. **113**

DIRECTORS—Qualification—Shares held "in his own right"—Shares held as liquidator of another company – – – **148**
See COMPANY. 4.

DISCLAIMER—Patent—Pending litigation—Liberty to apply for leave to disclaim
See PATENT. 1. **85**

DISCRETION—Maintenance, Discretionary trust for—Remoteness – – – **624**
See WILL. 9.

DISENTAIL—Convict—Administrator—Power to disentail convict's estates tail—Forfeiture – – – – – **440**
See FELONY.

DISMISSAL—Schoolmistress—Powers of manager – – – – – **451**
See EDUCATION.

DISTRINGAS—Company—Shares—Priority—Negligence—Possession of certificates
See COMPANY. 10. **659**

DIVESTING CLAUSE—"Born in my lifetime"—Child en ventre sa mère – – **583**
See WILL. 1.

DIVORCE—*Separation Deed—Alimony—Annuity—Deduction of Income Tax—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 103—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

A divorce suit was compromised by the parties agreeing upon a deed of separation, whereby it was referred to an arbitrator to determine the amount of the wife's alimony, and the arbitrator having fixed the amount, the husband, by a supplemental deed, covenanted to pay the annual sum awarded by the arbitrator to trustees in trust for the wife:—

Held, that the annuity was payable less income tax.

In re BARRY'S TRUSTS. BARRY *v.* SMART
Kekewich J. 768

DOCK COMPANY—Railway company—Amalgamation—Water obtained from land acquired for purposes of railway—Ultra vires – – – – – **310.**
See COMPANY. 6.

DUTY—Public revenue.
See under REVENUE.

EDUCATION—*Public Elementary School—Non-provided School—Dismissal of Schoolmistress—Powers of Manager—Consent of Education Committee—Power of Committee to act by a Sub-committee—Powers of Section of Sub-committee—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7, 17; *Sched. I., A* (6).

Plaintiff was engaged as mistress of a non-provided school (a school maintained but not provided by the local education authority under

EDUCATION—*continued.*

the Education Act, 1902), under an agreement with the managers of the school, one of the terms of which was that either party might terminate the agreement on giving the other party three calendar months' notice in writing.

The Act of 1902 came into operation in the district in August, 1903, and the Berkshire County Council was "the local education authority."

The county council, acting under s. 17 of the Act, delegated all its powers under the Act (except the power of raising a rate or borrowing money) to an education committee; the committee, under Sched. I., A (6), appointed a sub-committee to deal with the appointment and dismissal of teachers: and the sub-committee appointed a section to deal with the details "surrounding" the dismissal of teachers, and to make recommendations to the sub-committee.

In these circumstances the managers came to the conclusion that plaintiff was out of harmony with them and that this was detrimental to the best interests of the school, and on October 17, 1905, at a meeting at which plaintiff attended, the managers passed a resolution that the plaintiff should be asked to resign, and that if she refused notice should be sent to the education committee that the managers desired to terminate their engagement with her. As plaintiff did not resign, the managers on November 23 wrote to the education committee asking for its consent to the dismissal of the plaintiff forthwith on payment of three months' salary. On November 25 the section gave its consent, and on November 28 the education secretary wrote: "The committee will approve the notice given by your managers to Miss Y."—the plaintiff—"to terminate her engagement." On November 30 the managers gave notice in writing of dismissal, stating that the notice had the approval of the education committee, and enclosing a cheque for three months' salary in lieu of notice. On December 9 the sub-committee approved and adopted the action of the section.

On December 18 plaintiff commenced an action to restrain the defendants from acting on the notice to her, and on January 19 applied for an injunction. On January 20, before the argument was concluded, the education committee passed a resolution consenting to the dismissal.

Held, as follows: (1.) That the effect of the delegation under s. 17 was that the education committee was, in respect of any powers as to the dismissal of teachers, the educational authority.

(2.) That to the sub-committee there was delegated power to determine, and not merely to report to the committee upon, the question whether consent to dismissal should be given.

(3.) That the section was only a subordinate body, the duty of which was to consider and report to the sub-committee, and the action of which required the sub-committee's approval, and therefore that the consent of the education authority had not been obtained at the time of the dismissal.

But *held*, further: (4.) That, if consent to dismissal was required, it was not a condition precedent to dismissal, but if given subsequently

EDUCATION—*continued.*

operated as a ratification of dismissal with the provisional consent of the section.

(5.) That the effect of s. 7 was that unless the education authority intervened, the power to appoint and dismiss teachers rested with the managers.

(6.) That if the education authority intervened, the managers must either yield to that authority's wishes, or disqualify the school for maintenance from public funds; and

(7.) That the requirements of the Act as to consent were operative only as between the managers and the education authority, and gave no right to the teacher.

Semble, that when the managers of a non-provided school fail to comply with the requirements of any of the conditions and provisions contained in clauses (*a*) to (*e*) of sub-s. 1 of s. 7 of the Act of 1902, compliance with any requirement cannot be enforced by mandamus or otherwise—the only consequence of the failure being that the local education authority is released from its obligation to maintain the school out of public funds. YOUNG *v.* CUTHBERT
Buckley J. 451

"ESTATE" — Land transfer — Costs to come "out of the estate" – – – **762**
See ADMINISTRATION. 4.

ESTATE DUTY—Lunatic entitled to both real and personal estate—Merger of charge
See REVENUE. **673**

ESTATE TAIL—"Born in my lifetime"—Divesting clause—Child en ventre sa mère
See WILL. 1. **583**

—— Convict — Administrator — Power to disentail convict's estates tail—Forfeiture
See FELONY. **440**

—— Covenant to settle wife's after-acquired property—Construction – – **578**
See SETTLEMENT. 1.

ESTOPPEL—Patent—Infringement — Purchase without notice of condition – **605**
See PATENT. 4.

EVIDENCE — Roadside waste — Dedication—Presumption—Public authorities protection – – – – – **342**
See HIGHWAY.

EXECUTOR—Contempt—Disobedience of order to pay money—Debtor executor – **697**
See ATTACHMENT. 1.

—— Duty of executor to give notice of legacy —Action to recover legacy – **25**
See LIMITATIONS, STATUTE OF.

—— Intestate's estate—Statute of Limitations —Incapacity to sue co-executor at law
See ADMINISTRATION. 1. **265**

—— Lien—Partnership real estate—Deposit of title-deeds—Notice—Priorities – **113**
See PARTNERSHIP. 1.

EXONERATION—Contrary intention—Direction to pay debts, "except mortgage on Blackacre"—Other mortgages – **531**
See WILL. 6.

FELONY—*Convict — Administrator — Power to Disentail Convict's Estates Tail—Forfeiture Act*, 1870 (33 & 34 *Vict. c.* 23), *ss.* 10, 12.

The Forfeiture Act, 1870, provides that all the real and personal property of a convict shall vest in the administrator appointed under the Act for all the estate and interest of such convict therein, and that the administrator shall have absolute power to sell, convey and transfer any part of such property :

Held, that this power did not authorize the administrator to convey in fee simple property of which the convict was seised for an estate tail. *In re* GASKELL & WALTERS' CONTRACT
Kekewich J. 440

FIDUCIARY CAPACITY — Contempt — Disobedience of order to pay money—Debtor executor – – – **697**
See ATTACHMENT. 1.

FINANCE ACT.
See under REVENUE.

FINE—Sale of copyholds—Death of vendor before completion — Fine on heir's admission – – – – – **534**
See LANDS CLAUSES ACTS. 3.

FINE ARTS COPYRIGHT.
See under COPYRIGHT.

FORECLOSURE—Conditions of proviso for redemption—Construction—Covenant to pay interest half-yearly – – **804**
See MORTGAGE. 1.

FORFEITURE — Convict — Administrator — Power to disentail convict's estates tail
See FELONY. **440**

—— Deposit—Judgment for specific performance against purchaser – – **796**
See VENDOR AND PURCHASER. 5.

HARBOUR—*Harbour Dues—Port—"Limits of Port"—Ships loading or unloading Goods within Limits of Port—Fiscal or Customs Port—Commercial or Local Port—Natural Port artificially enlarged — Statute — Construction — Contemporanea Expositio*—33 *Geo.* 3, *c. cxxiii.*—49 *Geo.* 3, *c. xxiv.*

By two Acts passed respectively in 1793 and 1809, the trustees of Carnarvon Harbour thereby appointed were authorized to levy specified rates or duties upon all ships loading or unloading within the limits of the port of Carnarvon, and upon goods loaded or unloaded on or from vessels within the limits of that port.

The plaintiff was the owner of a small port, called Port Dinorwic, situate on the east side of the Menai Straits, about four miles to the north of Carnarvon. Since the passing of the Act of 1809 there had been constructed by the plaintiff's predecessors in title on the plaintiff's land, further inland than the natural high-water mark at that date, docks and quays, which were connected with the sea by an artificial channel and lock, so that at high water vessels could go in to and come out from those docks and unload or load at the quays.

The fiscal port of Carnarvon extended along the Straits some way to the north of Port Dinorwic, and the trustees claimed to be entitled to payment of the duties in respect of vessels loading or unloading at the plaintiff's quays. The plaintiff brought the action claiming a declaration that Port Dinorwic, including his docks and quays, was not within the limits of the port of Carnarvon, and that the trustees were not entitled to claim payment of the duties upon vessels which passed through the north end of the Straits to or from Port Dinorwic or the plaintiff's docks or quays, or any rates or duties on goods loaded or unloaded on or from vessels at Port Dinorwic or on or from the plaintiff's docks or quays.

There was evidence that the duties claimed by the trustees had been for many years and up to a short time before the commencement of the action paid by the plaintiff and his predecessors without dispute.

The evidence also satisfied the Court that those who made use of Port Dinorwic derived some benefit from the works which the trustees had executed under their statutory powers :—

Held, on the construction of the Acts, and having regard to the above facts, that the words "the limit of the port" in the Act must be taken to have been used in the sense of the limits of the fiscal port ; that the plaintiff's docks and quays were within those limits ; and that the trustees were entitled to payment of the duties which they claimed.

Decision of Kekewich J. affirmed.

The words "within the limits of the port" have not acquired a recognized technical meaning as denoting a customs port.

Per Stirling L.J. : The plaintiff's predecessors had by their own acts enlarged the limits of the port.

Per Cozens-Hardy L.J. : If by artificial means, such as the construction of a dock, the line of high tide is carried further inland, the limits of the fiscal port must follow that line. The limits of the fiscal port must be the present high-water mark.

Kingston-upon-Hull Dock Co. v. *Browne*, (1831) 2 B. & Ad. 43, discussed and distinguished. ASSHETON SMITH *v.* OWEN
C. A. 179

"HEREDITAMENTS" — Condition requiring resettlement—Money held in trust for investment in land – – – **120**
See WILL. 5.

HIGHWAY — *Roadside Waste — Dedication — Presumption — Evidence — Public Authorities Protection—Action for Declaration of Title—Delay—Continuance of Injury—Cause of Action —Rules of Supreme Court*, 1883, *Order XXV., r.* 5—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

Fences by the side of a railway are prima facie the boundaries of the highway so as to raise

HIGHWAY—*continued.*

a presumption that the public right of way extends over the whole space of ground between the fences. But the mere existence of fences on either side of a highway is not conclusive. In order to raise the presumption it must be proved that there is nothing to shew that they were not put up as boundaries of the highway.

The plaintiff claimed that a triangular piece of land abutting on and not fenced off from a highway belonged to him :—

Held that, in the absence of anything to shew the contrary, it must be assumed from the nature and position of the fence surrounding the land that it had been put up as a boundary of the highway ; that the presumption therefore arose that the land formed part of the highway ; and, on the evidence, that there was nothing to rebut that presumption.

The plaintiff erected a fence round the piece of land. The local authority pulled down the fence and afterwards wrote a letter asserting their claim to the land. More than six months after this letter the plaintiff brought an action against them for a declaration that the land belonged to him and an injunction to restrain them from trespassing on it. By his statement of claim he alleged that the defendants had pulled down his fence ; that they claimed that the land formed part of the highway, and that this claim prevented him from selling the land :—

Held, that the assertion of the defendants' claim to the land gave the plaintiff no cause of action, and, therefore, that he could not take advantage of the power given to the Court by the Rules of the Supreme Court, Order XXV., r. 5, to make a merely declaratory judgment ; that the only act of the defendants which gave him any cause of action was the pulling down of the fence ; that the Public Authorities Protection Act, 1893, applied ; the action was brought too late, and must be dismissed with costs as between solicitor and client. OFFIN *v.* ROCHFORD RURAL DISTRICT COUNCIL

Warrington J. 342

HOTCHPOT—Intestacy—Advances—Stipulation as to hotchpot – – – – **58**
See ADMINISTRATION. 3.

HUSBAND AND WIFE—*Policy of Assurance—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy for Benefit of Widow or Children—Death of Wife—Second Marriage of Assured.*

A man, having a wife living, effected two policies on his life, in accordance with the provisions of s. 10 of the Married Women's Property Act, 1870. The policy moneys were expressly made payable to his widow and children, or some or one of them, as he should by deed or will appoint. His wife died, he married again, and by deed appointed the policy moneys to his second wife if she should survive him and become his widow. He died leaving his second wife and children of both marriages surviving :—

Held, that an after-taken wife is within the Act of 1870, and the widow was entitled to the moneys. For this purpose there is no difference between s. 10 of the Married Women's Property Act, 1870, and s. 11 of the Act of 1882.

In re Browne's Policy, [1903] 1 Ch. 188 followed.

Held, also, on the construction of the policies, that if the second wife were outside the Act, she would still have been entitled by virtue of the contract with the insurance company. *In re* PARKER'S POLICIES – **Swinfen Eady J. 526**

HUSBAND AND WIFE—*continued.*

—— Covenant to settle wife's after-acquired property—Construction—Estate tail
See SETTLEMENT. 1. **578**

IDIOTS.
See under LUNACY.

ILLEGITIMATE CHILDREN — Indication of intention—Class gift—Future children —Uncertainty – – – – **542**
See WILL. 2.

INCOME TAX — Annuity—Duty of trustee to deduct – – – – – **793**
See TRUSTEE. 2.

—— Company—Directors' fees – – **148**
See COMPANY. 4.

—— Separation deed — Alimony — Annuity — Deduction of income tax – – **768**
See DIVORCE.

INDEMNITY — Receiver and manager—Borrowing—Priority over debenture-holders
See COMPANY. 8. **497**

INFANT — Express trust—Infant legatee—Duty of executor to give notice of legacy
See LIMITATIONS, STATUTE OF. **25**

INFRINGEMENT — Patent.
See under PATENT.

INJUNCTION — Noisy neighbourhood — Trade district—Printing machinery – **234**
See NUISANCE.

INSURANCE, LIFE — Policy for benefit of wife and children—Death of wife—Second marriage of assured – – – **526**
See HUSBAND AND WIFE.

INTEREST — Arrears, recovery of—Real property—Limitation Act – – **67**
See VENDOR AND PURCHASER. 8.

—— Mortgage—Foreclosure—Conditions of proviso for redemption – – – **804**
See MORTGAGE. 1.

—— Mortgage—Redemption action—Accounts — Compound interest — Proviso for capitalization of interest in arrear **165**
See MORTGAGE. 2.

INTESTACY — Class—Contingent or vested—Gift over on death "without leaving any children" – – – – **570**
See WILL. 3.

—— Lunatic — Advances — Stipulation as to hotchpot – – – – – **58**
See ADMINISTRATION. 3.

INVESTMENTS — Costs—Re-investment in land —Apportionment – – **615, 619, n.**
See LANDS CLAUSES ACTS. 1, 2.

—— Will—"Company"—Power to invest in stocks and securities of companies—Companies not registered in the United Kingdom – – – – – **131**
See WILL. 8.

JUDGMENT — Breach of trust—Judgment for recovery of money—Four-day order **93**
See ATTACHMENT. 2.

—— Specific performance against purchaser—Forfeiture of deposit—Form of order
See VENDOR AND PURCHASER. 5. **796**

JURISDICTION — Lunacy — Management and administration—"Lawfully detained"
See LUNACY. 2. **565**

LAND TRANSFER — Costs to come "out of the estate" — Probate action—Insufficient personalty – – – – **762**
See ADMINISTRATION. 4.

—— Marshalling assets—Effect of Land Transfer Act – – – – – **446**
See ADMINISTRATION. 2.

LANDS CLAUSES ACT—*Costs—Reinvestment in Land—Purchase-money exceeding Fund in Court — Apportionment — Form of Order — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80.

The owners of a fund in Court, representing land taken compulsorily by a public body, proposed to invest more than double the amount of the fund in the purchase of fresh land, paying the purchase-money pro tanto out of the fund in Court and finding the balance themselves :—

Held, that under s. 80 of the Lands Clauses Consolidation Act, 1845, the public body must pay the costs of reinvestment except so far as they were increased by reason of the purchase-money exceeding the fund in Court.

Order in Seton on Judgments, 6th ed. p. 2457, Form 2, adopted.

Practice discussed. *In re* CLARK
Swinfen Eady J. 615

2. —— *Costs—Investment in Land.*

Where the purchase-money exceeds the fund in Court paid in by a company, and the applicant provides the excess in cash, the company has to pay the whole costs, except so far as they have been increased by reason of the purchase-money exceeding the fund.

In re METROPOLITAN RAILWAY COMPANY AND GONVILLE AND CAIUS COLLEGE, CAMBRIDGE.

Kay J. at Chambers, March 24, 1887.
[1906] 1 Ch. 619, n.

3. —— *Sale of Copyholds—Death of Vendor before Completion—Fine on Heir's Admission—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 82.

A vendor, as trustee of a will, agreed to sell copyholds to a public tramway company, the company agreeing to pay "the vendor's costs of title and conveyance as provided by the Lands Clauses Act, 1845." The vendor died before completion, and his customary heir was admitted in order that he might convey under s. 95 :—

Held, that the fine and fees payable on this admission must be borne by the company under s. 82.

In re Liverpool Improvement Act, (1868) L. R. 5 Eq. 282 ; *Ex parte Keatley*, (1890) 25 L. R. Ir. 265 ; *In re Lloyd and North London Railway (City Branch) Act*, 1861, [1896] 2 Ch. 397 ; and *In re Bear Island Defence Works and Doyle*, [1903] 1 I. R. 164, applied. *In re* LONDON UNITED TRAMWAYS ACT, 1900
Swinfen Eady J. 534

—— Lunatic, Land vested in, as tenant for life—Committee—Power of sale – – **712**
See LUNACY. 1.

LEASE — *Covenant to Build—Specific Performance.*

The lessee of a plot of land for a term of ninety-nine years, commencing in 1894, covenanted within three years from the commencement of the term to erect seven dwelling-houses on the demised premises, similar to dwelling-houses already erected in a certain street. The lease contained an exception of the minerals (which did not belong to the lessor) and reserved to the owner for the time being full rights of working, including power to destroy the surface. At the date of this lease the lessee had acquired from the owner a lease of the minerals with full surface rights. The houses in the street in question were not exactly alike, some having four rooms and others five. In an action for specific performance of the covenant :—

Held—(1.) Upon the construction of the lease that the covenant was not extinguished by the power reserved by the lease to the mineral owner to destroy the surface ; (2.) that damages assessed on the principle of *Ebbetts* v. *Conquest*, [1895] 2 Ch. 377, would afford no adequate remedy ; (3.) that the houses to be erected were sufficiently defined to enable the Court to order specific performance ; and specific performance was ordered accordingly. MOLYNEUX *v.* RICHARD – – – – **Kekewich J. 34**

LEASEHOLDS — Company—Winding-up—Contract to sell assets—Omission to assign
See COMPANY. 13. **359**

—— Conditions of sale—Title—Trust for sale—Trustee—Sale by way of underlease **684**
See VENDOR AND PURCHASER. 3.

LEASING POWERS—Occupation lease—Principal mansion house—Consent of trustees
See SETTLED LAND. 1. **11**

LEGACY.
See under WILL.

LETTER—Book—Posthumous letter—Proprietorship of copyright—Right to prevent publication – – – – **101**
See COPYRIGHT. 1.

LETTERS PATENT—
See under PATENT.

LICENCE — Patent — Infringement — Purchase without notice of condition – **605**
See PATENT. 4.

LICENSING ACTS — *Public-house — Licence — Compensation for Non-renewal—Charge for Compensation Fund—Deductions from Rent—Tenant for Life and Remainderman — Annuitant — Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3.

The deductions which, under the Licensing Act, 1904, a licence-holder is allowed to make from his rent in respect of charges imposed by quarter sessions to form a compensation fund for non-renewal of licences under that Act are a charge upon the rent. In cases where the reversion is settled, a tenant for life has no right, in the absence of special directions in the will or settlement, to have any part of these deductions paid out of capital. *In re* SMITH. SMITH *v.* DODSWORTH – – **Swinfen Eady J. 799**

LIEN—Executor's lien—Partnership real estate — Deposit of title-deeds — Notice — Priorities – – – – – **113**
See PARTNERSHIP. 1.

—— Unpaid purchase-money—Personal estate—Reversionary interest, Sale of—Trustee purchaser – – – – – **67**
See VENDOR AND PURCHASER. 8.

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIMITATIONS, STATUTE OF—*Legacy—Action to Recover Legacy—Share of Testator's Estate—Express Trust—Infant Legatee—Duty of Executor to give Notice of Legacy—Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

A testator bequeathed all his property to his wife and children, and appointed his wife sole executrix. He left him surviving his wife and two infant children, viz., a son, long since deceased, and a daughter, who attained twenty-one in 1876. The widow married again, and during her daughter's infancy she, in her character of executrix, advanced all the testator's estate to her second husband upon the security of a mortgage which proved insufficient. She survived her second husband, and died in 1885, having left all her property away from her daughter. The daughter, as sole surviving beneficiary under her father's will, claimed the whole of her mother's estate, upon the ground that it represented moneys retained by her mother under an order of the Court in part satisfaction of the mortgage, and in 1903 she commenced an action against her mother's executors for an account on this footing :—

Held, that the mother was not an express trustee of these moneys for the plaintiff, that this was an action to recover a legacy within s. 8 of the Real Property Limitation Act, 1874, and that the claim was statute-barred.

Whether the mother was under any legal obligation to inform her daughter upon attaining twenty-one of the benefit conferred on her under her father's will, *quære*. *In re* MACKAY. MACKAY *v.* GOULD – – **Kekewich J. 25**

—— Intestate's estate—Incapacity to sue co-executor at law – – – **265**
See ADMINISTRATION. 1.

LIMITATIONS, STATUTE OF—*continued.*

—— Restrictive covenants—Negative covenants —Title by adverse possession – **386**
See VENDOR AND PURCHASER. 7.

—— Vendor's lien—Personal estate—Interest—Arrears, Recovery of – – – **67**
See VENDOR AND PURCHASER. 8

LIQUIDATOR — Company — Directors—Qualification—Shares held as liquidator of another company – – – **148**
See COMPANY. 4.

—— Costs — Taxation — Disbursements — Professional charges – – – **491**
See COSTS.

LOCAL GOVERNMENT—Streets.
See under STREETS.

LOCKE KING'S ACTS—Exoneration—Direction to pay debts "except mortgage on Blackacre" – – – – **531**
See WILL. 6.

LONDON—*Building — Party Wall — Railway Company—Building acquired by Agreement for Station Purposes outside Limits of Deviation—Demolition — Adjoining Owner — Interference with Party Structure — Party-wall Notice—"Building Owners"—Railways Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 16, 45—*Charing Cross, Euston, and Hampstead Railway Act*, 1893 (56 *&* 57 *Vict. c. ccxiv.*), *s.* 31—*London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 5, *sub-s.* 31, *and s.* 201 ; *Part VIII.*

By the Charing Cross, Euston, and Hampstead Railway Act, 1893 (56 & 57 Vict. c. ccxiv)., which incorporated the Lands Clauses Acts, the Companies Clauses Acts, and the Railways Clauses Consolidation Act, 1845, the company were authorized (s. 5) to make and maintain, in certain lines and according to certain levels, the railway and other works described in the Act, with all necessary and proper stations, works, and conveniences therewith. By s. 31 the company were empowered to take by agreement for the extraordinary purposes mentioned in the Railways Clauses Consolidation Act. 1845 (which included station purposes), any quantity of land not exceeding five acres ; and it was provided that "any buildings erected on any land acquired under this section (except such buildings or parts of buildings as may be used for the purposes of a station) shall be subject to the provisions of the Acts relating to buildings in the metropolis." Under s. 31 of the Act the company acquired by agreement for the purposes of one of their stations a building which was situate outside their limits of deviation and not within their compulsory powers, and proceeded to pull it down without serving on the adjoining owner the party-structure notice required by the London Building Act, 1894 :—

Held, that assuming that the party structure was affected by what the company had done, the company were not exempted by s. 31 of their Act from Part VIII. of the London Building Act, 1894, and were consequently bound to give to the owners of the adjoining premises the usual party-structure notice, and that in default of

LONDON—*continued.*

their so doing the remedy of the adjoining owners was by injunction and not compensation under the Lands Clauses Consolidation Act, 1845 :

But *held*, upon the facts, that the company were not "building owners" within the meaning of s. 5, sub-s. 31, of the London Building Act, 1894, inasmuch as they had done nothing which in substance amounted to an interference with the party structure. LEWIS & SOLOME *v.* CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY COMPANY – – **Warrington J. 508**

2. —— *Streets—Widening — Power to take Part of House — Metropolis Management — Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 82.

Plaintiffs, knowing of the scheme of a municipal corporation for widening a street which would affect premises about to be taken by them, took a lease of a house and became liable under the covenants therein to make substantial alterations in the premises (with a view to the same being used by plaintiffs as an outfitters' and tailors' shop).

The premises at the date of the lease consisted of an old house in the middle of the front of which stood a large chimney-stack connected with several fireplaces, and the building had three floors. The alterations to be made by plaintiffs involved the destruction of the stack (so as to give a greater space for the new shop on the ground floor) and the fireplaces, the conversion of the three floors into two floors, raising the ceiling of the ground floor, and throwing the remains of the house into a first floor room running from back to front. The corporation, for the purpose of widening the adjoining street, gave notice to treat (purporting to be under s. 82 of Michael Angelo Taylor's Act) for part of the house, consisting of frontage of from 5 ft. 2 in. to 7 ft. 2 in. in depth, the result of taking which would have been to destroy the stack and fireplaces, to render practically useless rooms on the first and second floors, to absorb the space acquired by removing the stack into the street, and (unless the adjoining houses were both thrown back to a like extent, a change which had not yet been effected) to throw the frontage of the plaintiffs' building back from the main line of frontage :—

Held, that the proposed acquisition, if allowed, would result in destroying the house as a house, that their knowledge of the scheme did not preclude the plaintiffs from relief, and that an injunction must be granted restraining the corporation from proceeding under the notice to treat.

Observations on the judgment of Kindersley V.-C. in *Thomas* v. *Daw*, (1866) L. R. 2 Ch. 2, n. THOMPSON *v.* HAMMERSMITH CORPORATION – – – – – **Buckley J. 299**

—— House in London—Open contract—Adjoining house—Party-wall notice and award —Non-disclosure – – – **335**
See VENDOR AND PURCHASER. 4.

LUNACY—*Committee—Person of Unsound Mind not so found by Inquisition—Power exercisable by Committee under Order of Judge—Power of Sale—Land vested in Lunatic as Tenant for Life—Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *ss.* 116, 120, 128—*Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 7—*Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 3, 62.

The Lunacy Act, 1890, s. 116, does not empower the judge in lunacy to authorize the quasi-committee appointed under that section with regard to the estate of a person of unsound mind not so found by inquisition, to exercise, on behalf of that person, in respect of land of which he is only tenant for life, the power of sale given by s. 7 of the Lands Clauses Consolidation Act, 1845.

In re Baggs, [1894] 2 Ch. 416, n., followed.

In re X., [1894] 2 Ch. 415, and *In re Salt*, [1896] 1 Ch. 117, discussed.

In re S. S. B. (A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION) – **C. A. 712**

2. —— *Person of Unsound mind not so found —Management and Administration—"Lawfully detained"—Jurisdiction—Idiots Act*, 1886 (49 *&* 50 *Vict. c.* 25), *s.* 5—*Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 116, *sub-s.* 1 (*c*).

The expression "lawfully detained as a lunatic, though not so found by inquisition," as used in s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890, means "lawfully detained" under the provisions of the Acts of Parliament of this country ; and consequently there is jurisdiction to make administrative orders in the case of a person of unsound mind not so found who is detained in accordance with the Idiots Act, 1886.

In re Watkins, [1896] 2 Ch. 336, explained and distinguished. *In re* MARK WHALLEY AND *In re* W. R. WHALLEY – – – **C. A. 565**

3. —— *Vesting Order—Stock—Trust Fund—Trustee—Criminal Lunatic — Repealing Act—Saving Clause, Effect of—Jurisdiction, Reservation of—Lord Cairns' Act—Trustee Act*, 1850 (13 *&* 14 *Vict. c.* 60), *s.* 5—*Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *ss.* 136, 340, 342—*Form of Vesting Order.*

As the Lunacy Act, 1890, gives no jurisdiction to make a vesting order in the case of a trustee who is a criminal lunatic (see ss. 136 and 340), the old jurisdiction in such a case under s. 5 of the Trustee Act, 1850, is preserved by the proviso or saving clause in s. 342, notwithstanding that by that section s. 5 of the earlier Act is in terms repealed, there being nothing in the latter Act inconsistent with the preservation of that jurisdiction ; and the Court in lunacy will exercise that jurisdiction accordingly by making a vesting order under the Act of 1850.

Where an Act conferring a certain jurisdiction is repealed by a subsequent Act containing a saving clause to the effect that the repeal shall not affect any jurisdiction established under the repealed Act, the jurisdiction under the repealed Act should, in the absence of any inconsistency between the two Acts, be regarded as preserved by virtue of the saving clause.

The dictum of Baggallay L.J. in *Sayers* v. *Collyer*, (1884) 28 Ch. D. 103, 107, as to the preservation of the jurisdiction under Lord Cairns' Act by the saving clause in the repealing

LUNACY—*continued.*

Act (the Statute Law Revision and Procedure Act, 1883), considered.

Form of vesting order of stock standing in the name of a criminal lunatic trustee.
In re R. – – – – – **C. A. 730**

—— Estate duty—Lunatic entitled to both real and personal estate—Merger of charge
See REVENUE. **673**

LUNATIC—Intestacy — Advances — Stipulation as to hotchpot – – – – **58**
See ADMINISTRATION. 3.

MAINTENANCE — Discretionary trust for — Validity—Remoteness – – **624**
See WILL. 9.

—— Tenant for life—Will—Gift to widow during widowhood for the maintenance of herself and her children – – **146**
See SETTLED LAND. 2.

MANAGER — Receiver and — Borrowing—Indemnity — Priority over debentureholders – – – – – **497**
See COMPANY. 8.

—— Receiver and — Principal and agent — Receiver's remuneration—Priorities
See COMPANY. 7. **365**

MANCHESTER—Tramway — ultra vires—Business of common carriers – – **643**
See CORPORATION.

MANSION HOUSE—Leasing powers — Occupation lease – – – – **11**
See SETTLED LAND. 1.

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARSHALLING ASSETS — Effect of Land Transfer Act – – – – **446**
See ADMINISTRATION. 2.

MASTER AND SERVANT—Dismissal of schoolmistress—Powers of manager – **451**
See EDUCATION.

MEETINGS—Company — Directors — Qualification—Notice—Special business – **148**
See COMPANY. 4.

MEMORANDUM AND ARTICLES OF ASSOCIATION.
See under COMPANY.

MERGER — Estate duty — Lunatic entitled to both real and personal estate—Merger of charge – – – – – **673**
See REVENUE.

METROPOLIS.
See under LONDON.

MICHAEL ANGELO TAYLOR'S ACT—Streets—Widening – – – – – **464**
See STREETS.

MICHAEL ANGELO TAYLOR'S ACT—*continued.*

—— Streets—Widening—Power to take part of house – – – – – **299**
See LONDON. 2.

MINES — *Waterworks—Reservoir — Lands purchased by Agreement, together with Mines—Right to support Minerals under adjacent Land—Limit of Forty Yards—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18—27.

When land is taken for the purpose of constructing waterworks under a special Act, which incorporates the Waterworks Clauses Act, 1847, the rights of the undertakers to support from minerals, whether subjacent or adjacent, and whether within or without the statutory limit of forty yards, are governed by ss. 18 to 27 of the Waterworks Clauses Act, and the rights defined by those sections are in substitution for, and exclude any rights they might have had at common law. It makes no difference whether the land is taken under compulsory powers, or by agreement, or whether the surface is purchased alone or the minerals are purchased with it.

In 1875 a corporation purchased land from S. and other adjoining land from T., for the purpose of constructing a reservoir. Both the conveyances contained recitals that the corporation had agreed to purchase pursuant to the powers given them by a special Waterworks Act, which incorporated the Lands Clauses Consolidation Act and the Waterworks Clauses Act, but the purchases were made by agreement, without putting into force any compulsory powers. The conveyance from S. reserved all minerals, with power to work them without paying any compensation for damage done to the surface. The conveyance from T. included the minerals and all his right and interest in the land. The defendants were lessees from S. of the minerals under the lands bought from him, and other lands, and had given notice to the corporation, under the Waterworks Clauses Act, of their intention to work the coal adjacent to and under the lands bought from S. The corporation gave no notice of willingness to pay compensation. The defendants continued their workings and thereby caused subsidence of the surface of the land bought from T. This was in part caused by workings more than forty yards from the land injured. The corporation brought this action to restrain the defendants from working so as to let down the lands bought from T. They relied on their common law rights as owners to support from the adjacent land :—

Held, that the rights of the corporation were governed wholly by the Waterworks Clauses Act, 1847, and they had no right to lateral support from any minerals for which they had not paid or been willing to pay compensation under the Act, whether the minerals in question were within or without the limit of forty yards. MANCHESTER CORPORATION *v.* NEW MOSS COLLIERY, LIMITED – – **Farwell J. 278**

—— Conditions of sale—Right to rescind—Misdescription—Absence of title to mines —Compensation – – – **412**
See VENDOR AND PURCHASER. 2.

MISDESCRIPTION—Conditions of sale—Right to rescind—Absence of title to mines—Compensation – – – – **412**
See VENDOR AND PURCHASER. 2.

MISREPRESENTATION—Sale under direction of Court—Contract—Rescission—Costs recoverable by purchaser – – **426**
See VENDOR AND PURCHASER. 6.

MONEY-LENDERS—*Registration—Contract of Unregistered Money-lender — Validity—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-ss.* 1 (*a*) (*c*), 2.

Sect. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900, applies to a money-lender who has not registered himself as such under the regulations of the Act, and prohibits him from making any agreement with respect to the advance and repayment of money, and from taking any security for money, in the course of his business as a money-lender. Consequently any such agreement is illegal and void, and the statutory prohibition being intended for the protection of the borrower, the borrower under any such agreement may recover any securities which he has given to the money-lender, although the money-lender cannot recover the money which he has advanced.

Victorian Daylesford Syndicate, Ld. v. *Dott*, [1905] 2 Ch. 624, followed and approved. BONNARD *v.* DOTT – – – – **C. A. 740**

MORTGAGE—*Foreclosure—Principal not due—Covenant to pay Interest half-yearly—Temporary Default—Conditions of Proviso for redemption—Construction.*

A mortgage of January 30, 1900, contained the following provisions:—

1. A covenant to pay the principal on January 1, 1914, "with interest that may be then due" at a specified rate.

2. A covenant to pay interim interest half-yearly on specified days.

3. A conveyance of the property "subject to the proviso for redemption hereinafter contained."

4. A proviso that the mortgagee would not call in the principal before January 1, 1914, if the half-yearly interest were paid on the specified days or within twenty-one days thereof.

5. A proviso that the mortgagor should not pay off the principal before January 1, 1914.

6. A proviso that if the mortgagor should on January 1, 1914, pay the principal, "with interest for the same in the meantime at the rate aforesaid that may be due and unpaid," the mortgagee would reconvey.

The mortgagor having paid an instalment of interest twenty-seven days after the specified day, the mortgagee sued for foreclosure: –

Held, on the construction of the deed, that the proviso for redemption did not import a condition that interest was to be paid half-yearly on the specified days or within twenty-one days thereof, and, consequently, that as there was no condition broken, the mortgagee's estate was not absolute at law, and there could be no foreclosure.

In re Turner, (1895) 43 W. R. 153; 13 R. 132, followed.

MORTGAGE—*continued.*

Edwards v. *Martin*, (1856) 25 L. J. (Ch) 284; *Burrowes* v. *Molloy*, (1845) 2 J. & Lat. 521, 526; and *Stanhope* v. *Manners*, (1763) 2 Eden, 197, distinguished. WILLIAMS *v.* MORGAN **Swinfen Eady J. 804**

2. —— *Redemption Action—Accounts—Compound Interest—Proviso for Capitalization of Interest in Arrear—Mortgagee in Possession—Receipt of Rents available for Payment of Interest—Mortgagor and Mortgagee.*

A mortgage of leaseholds contained a proviso that, if and so often as any interest due under the mortgagor's covenant should be in arrear for twenty-one days after the day appointed for the payment thereof, that interest should be treated as an accession to the capital secured by the deed as on the day on which the same ought to have been paid, and should thenceforth bear interest at the rate and on the days provided by the deed.

The mortgagee entered into possession of the property and received the rents.

On the taking of the accounts in a redemption action:—

Held, that, if on the expiration of twenty-one days after any interest became due, the mortgagor not having paid the interest, there was in the hands of the mortgagee, after deducting ground rent and other proper outgoings, an amount arising from the rents received by him sufficient for the payment of the interest, though it had not been actually appropriated to that purpose, the interest could not be said, within the meaning of the proviso, to be in arrear, and the mortgagee was therefore not entitled to have it capitalized.

Decision of Warrington J., [1905] 1 Ch. 241, affirmed.

Union Bank of London v. *Ingram*, (1880) 16 Ch. D. 53, and *Bright* v. *Campbell*, (1889) 41 Ch. D. 388, distinguished.

Dictum of Cotton L.J. in *Cockburn* v. *Edwards*, (1881) 18 Ch. D. 463, preferred to that of Jessel M.R. in the same case, 18 Ch. D. 456. WRIGLEY *v.* GILL – – – – **C. A. 165**

—— Shares—Refusal to register—Damages **549**
See COMPANY. 11.

—— Will—Exoneration—Direction to pay debts, "except mortgage on Blackacre"—Other mortgages – – – **531**
See WILL. 6.

MUNICIPAL CORPORATION.
See under CORPORATION.

NEGLIGENCE — Company—Shares—Priority—Possession of certificates – – **659**
See COMPANY. 10.

NOISE — Trade district—Noisy neighbourhood—Printing machinery—Injunction **234**
See NUISANCE.

NORTH-EASTERN RAILWAY (HULL DOCKS) ACT — Railway company—Dock company—Amalgamation—Water—Supply to dock—Ultra vires – – – **310**
See COMPANY. 6.

NOTICE — Company — General meeting convened by de facto directors—Validity of resolutions – – – – **148**
See COMPANY. 4.

—— Legacy, action to recover—Duty of executor to give notice of legacy – – **25**
See LIMITATIONS, STATUTE OF.

—— Partnership real estate—Executor's lien—Deposit of title deeds—Priorities **113**
See PARTNERSHIP. 1.

—— Party-wall notice—Building—Railway company – – – – – **508**
See LONDON. 1.

—— Restrictive covenants—Squatter's title — Statute of Limitations – – **386**
See VENDOR AND PURCHASER. 7.

NUISANCE—*Trade District—Noisy Neighbourhood—Printing Machinery—Noise, Increase of—Residence—Standard of Comfort—Injunction.*

In a locality devoted to noisy trades, such as the printing and allied trades, if a printing house or factory subjects the occupier of an adjoining residence to such an increase of noise as to interfere substantially with the ordinary comfort of human existence according to the standard of comfort prevailing in the locality, that is sufficient to constitute an actionable wrong entitling that occupier to an injunction.

The principles upon which a legal nuisance arising from an increase of noise in an already noisy neighbourhood may be restrained by injunction considered.

St. Helen's Smelting Co. v. *Tipping*, (1865) 11 H. L. C. 642 ; *Crump* v. *Lambert*, (1867) L. R. 3 Eq. 409 ; and *Sturges* v. *Bridgman*, (1879) 11 Ch. D. 852, considered and applied.

Decision of Warrington J. affirmed. RUSHMER *v.* POLSUE & ALFIERI, LIMITED **C. A. 234**

OMNIBUS BUSINESS — Railway company — Passengers—Incidental powers—Ultra vires – – – – – **811**
See RAILWAY.

PARTICULARS OF OBJECTIONS—Costs—Taxation—Patent action – – – **518**
See PATENT.

PARTNERSHIP—*Deceased Partner—Executor's Lien—Partnership Real Estate—Deposit of Title Deeds by surviving Partner for his own Debt—Notice—Priorities—Partnership Act*, 1890 (53 *&* 54 *Vict. c.* 39), *s.* 39.

A surviving partner can mortgage or sell partnership real estate for the purposes of the business, and the mortgagee or purchaser is not concerned to see to the application of the money unless he has notice that it is going to be used for an improper purpose.

The principles of *In re Langmead's Trusts*, (1855) 20 Beav. 20 ; affirmed on appeal, 7 D. M. & G. 353, applied.

The equitable mortgagee of a surviving partner by deposit of the title deeds of partnership real estate has priority over the lien of a deceased partner's executors on the same deeds for his share of the partnership assets.

In re Valletort Sanitary Steam Laundry Co., Ld., [1903] 2 Ch. 654, 660, followed. *In re* BOURNE. BOURNE *v.* BOURNE – **Farwell J. 113**

2. —— *Partner appointed Receiver — Receiver's Remuneration—Officer of the Court—Receiver, qua Partner, indebted to Partnership.*

A partner, who is appointed receiver of the partnership assets by the Court on the usual terms, is entitled to be paid his remuneration and costs as receiver out of the funds in his hands as receiver, although as a partner he is indebted to the partnership and is unable to pay what he owes. DAVY *v.* SCARTH – **Farwell J. 55**

PARTY WALL—Building—Railway company—Party-wall notice – – – **508**
See LONDON. 1.

PASSENGERS — Railway company — Omnibus business — Incidental powers — Ultra vires – – – – – **811**
See RAILWAYS.

PATENT — *Amendment of Specification — Disclaimer—Pending Litigation—Liberty to Apply for Leave to Disclaim—Form of Order—Patents, Designs and Trade Marks Act*, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 19.

Upon an application by a patentee to the Court under s. 19 of the Patents, Designs and Trade Marks Act, 1883, for liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, the Court is not concerned with the terms of the proposed amendment except for the purpose of guiding it in the exercise of its discretion under the section.

Consequently the Court will not refuse an application under this section upon the ground that the proposed amendment is not an amendment by way of disclaimer as distinguished from correction or explanation unless it is satisfied that this is so by a mere perusal of the specification. *In re* ALSOP'S PATENT – – **C. A. 85**

2. —— *Costs—Taxation—Action for Infringement of Patent—Defences of Non-infringement and Invalidity—Separate Issues—Dismissal of Action with Costs—Costs of Separate Issues—Particulars of Objections—Practice—Patents, Designs and Trade Marks Act*, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 29, *sub-s.* 6—*Rules of Supreme Court*, 1883, *Order* LXV., *r.* 2.

In an action for infringement of a patent the defendants denied infringement, and alleged want of subject-matter and of novelty by reason of a large number of alleged anticipations. At the trial the judge dismissed the action with costs on the ground of want of novelty in respect of two anticipations only :—

Held, that the taxing Master, in taxing the costs, must not disallow costs incurred with respect to issues on which the judge found that the defendants had failed, or tax the costs as if the action had been confined to proving the two objections on which the defendants succeeded, but must tax the whole of the defendants' costs,

PATENT—*continued.*

disallowing only the costs of those objections in respect of which no certificate was given pursuant to s. 29, sub-s. 6, of the Patents, Designs, and Trade Marks Act, 1883. HASKELL GOLF BALL COMPANY *v.* HUTCHISON & MAIN
Warrington J. 518

3. —— *Infringement — Combination—Specification—Insufficient Description—Repair—Old and New Component Parts.*

Decision of Swinfen Eady J., [1905] 1 Ch. 451, affirmed on the ground of insufficiency of specification alone, the Court of Appeal expressing no opinion upon the question of law dealt with by him, namely, whether, assuming the plaintiffs' patent for a combination of rim and tyre to be good, the defendants had infringed it by fitting, by way of repair, a new tyre for which there was no patent into a rim for which there was a patent. SIRDAR RUBBER COMPANY, LIMITED *v.* WALLINGTON, WESTON & CO.
C. A. 252

4. —— *Infringement—Licence—Condition—Purchase of patented Article from Licensee without Notice of Condition—Estoppel—Purchaser's Liability to Action for Infringement.*

If a patentee sells the patented article and the purchaser uses it he does not infringe, because the law implies a licence by the patentee to the purchaser to sell or deal with the article as he pleases, unless at the time of the purchase the patentee imposed a condition. If a purchaser buys from a licensee to whose licence the patentee has attached conditions, nothing turns (so far as licence as distinguished from estoppel is concerned) on the question whether the purchaser knew of the conditions or not. If a person innocently uses a patented invention, not knowing that there is a patent, he is none the less an infringer ; and if he buys from a licensee, not knowing that there are limits to the licence, he is equally an infringer. In this case, however, the patentee may be estopped from suing in certain circumstances, as, for instance, if he has acted in such a way as to lead the purchaser to suppose that the licence is not entitled. BADISCHE ANILIN UND SODA FABRIK *v.* ISLER
Buckley J. 605

5. —— *Practice—Expired Letters Patent—Action for Declaration of Invalidity—No Consequential Relief — Declaratory Order — Discretion of Court—Rules of Supreme Court*, 1883, *Order XXV., r. 5—Mode of Procedure—Petition for Revocation — Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 26, 32.

An action claiming merely a declaration of invalidity of letters patent already expired, where no legal right of the plaintiff has been infringed, is not maintainable.

Semble, the proper mode of procedure is by a petition for revocation under s. 26 of the Patents, Designs, and Trade Marks Act, 1883.

Order XXV., r. 5, discussed. NORTH EASTERN MARINE ENGINEERING COMPANY *v.* LEEDS FORGE COMPANY – – – **Joyce J. 324**

PERPETUITY—Settlement—Power of appointment—Contingent remainder – **783**
See POWER OF APPOINTMENT.

PETITION—Company—Winding-up—Statutory affidavit – – – – – **640**
See COMPANY. 14.

PHOTOGRAPHS — School — Good or valuable consideration – – – – **774**
See COPYRIGHT. 2.

PLAN—Implied representation—Power to vary —Cul-de-sac—Dedication to public—Public user – – – – **253**
See BUILDING SCHEME.

POLICY — For benefit of wife and children — Death of wife — Second marriage of assured – – – – – **526**
See HUSBAND AND WIFE.

POLL —Voting—"Personally or by proxy"—Power of chairman to direct manner of taking – – – – – **331**
See COMPANY. 12.

PORT — "Limits of port"—Ships loading or unloading goods within limits of port—natural port artificially enlarged – **179**
See HARBOUR.

POSSESSION —Restrictive covenants—Notice—Title by adverse possession—Statute of Limitations – – – – **386**
See VENDOR AND PURCHASER. 7.

POWER OF APPOINTMENT — *Settlement — Power of Appointment among Children—Exercise of Power—Appointment of Income to Children equally and of whole Income to Survivor for Life —Contingent Remainder—Perpetuity.*

By a settlement made in 1844 on the marriage of W. and G., real estate was settled to the use of G. for her life, and after her death to the use of such children of the marriage in such shares and manner as G. should by will devise the same. The only two children of the marriage were L. (born in 1846) and A. (born in 1852). G. died in 1877, having by her will devised that the yearly income of the settled estate should be equally divided "during their respective lives between my daughters L. and A.," and that "in the event of the death of either the survivor shall receive the whole income," and that on her death the estate should be sold and the proceeds divided among the children of L. and A. :—

Held, that the gift to the survivor was a contingent and not a vested estate, and as the survivor might be a person not ascertainable within twenty-one years from the death of G., the gift was void as contravening the rule against perpetuities. WHITBY *v.* VON LUEDECKE
Buckley J. 783

POWER OF SALE —Lunatic, Land vested in, as tenant for life—Committee – **712**
See LUNACY. 1.

—— Settled land—Land purchased by trustees and settled to like uses – – **789**
See SETTLED LAND. 3.

POWERS — Ultra vires — Railway company — Dock company—Amalgamation—Water —Supply to dock – – – **310**
See COMPANY. 6.

PRACTICE—Attachment.
See under ATTACHMENT.

PRACTICE—*continued.*

—— Service — Trustee — Contempt — Disobedience of order to pay money—Service of order – – – – – **692**
See ATTACHMENT. 3.

—— Vendor and purchaser—Forfeiture of deposit—Form of order – – **796**
See VENDOR AND PURCHASER. 5.

PRESUMPTION—Roadside waste—Dedication—Evidence—Public authorities protection
See HIGHWAY. **342**

PRINCIPAL AND AGENT — Receiver and manager — Receiver's remuneration—Priorities – – – – – **563**
See COMPANY, 7.

PRINTING MACHINERY—Noisy neighbourhood — Trade district—Injunction – **234**
See NUISANCE.

PRIORITY — Company—Shares — Negligence—Possession of certificates—Distringas
See COMPANY. 10. **659**

—— Partnership real estate—Executor's lien—Deposit of title deeds—Notice—Priorities – – – – – – **113**
See PARTNERSHIP. 1.

—— Receiver and manager — Borrowing—Indemnity — Priority over debenture-holders – – – – – **497**
See COMPANY. 8.

—— Receiver and manager—Principal and agent —Receiver's remuneration—Priorities
See COMPANY. 7. **365**

PROBATE—Land transfer—Costs to come "out of the estate"—Insufficient personalty
See ADMINISTRATION. 4. **762**

PROOF—Company—Bankruptcy of shareholder —Proof by company for unpaid calls and liability to future calls – **1**
See COMPANY. 16.

PROXY—Voting—"Personally or by proxy"—Poll—Power of chairman to direct manner of taking – – – **331**
See COMPANY. 12.

PUBLIC AUTHORITIES PROTECTION—Action for declaration of title—Delay—Continuance of injury – – – **342**
See HIGHWAY.

PUBLIC-HOUSE.
See under LICENSING ACTS.

PUBLIC POLICY—Illegitimate children—Class gift—Future children—Uncertainty
See WILL. 2. **542**

PUBLICATION—Right to prevent—Book—Posthumous letter—Proprietorship of copyright – – – – – **101**
See COPYRIGHT. 1.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY — *Omnibus Business—Passengers—Incidental Powers—Ultra vires.*

Railway companies, unless specially authorized to do so, have no power to carry on business as omnibus proprietors for the purpose of distributing and collecting their passengers. Such a business is not incidental to their undertaking.

London County Council v. *Attorney-General*, [1902] A. C. 165, applied. ATTORNEY-GENERAL *v.* MERSEY RAILWAY COMPANY
Warrington J. 811

—— Party-wall notice—Building acquired by agreement for station purposes outside limits of deviation – – – **508**
See LONDON. 1.

—— Powers — Ultra vires—Dock company—Amalgamation—Water obtained from land acquired for purposes of railway
See COMPANY. 6. **310**

REAL ESTATE CHARGES ACT—Exoneration —Direction to pay debts, "except mortgage on Blackacre"—Other mortgages – – – – – **531**
See WILL. 6.

REAL PROPERTY LIMITATION ACT—Interest—Arrears, Recovery of – – **67**
See VENDOR AND PURCHASER. 8.

—— Legacy, action to recover—Duty of executor to give notice of legacy – – **25**
See LIMITATIONS, STATUTE OF.

—— Restrictive covenants—Negative covenants —Title by adverse possession – **386**
See VENDOR AND PURCHASER. 7.

RECEIVER — Borrowing—Indemnity—Priority over debenture-holders – – **497**
See COMPANY. 8.

—— Costs—Property recovered or preserved—Charging order – – – – **271**
See COMPANY. 2.

—— Partner appointed receiver—Receiver's remuneration – – – **55**
See PARTNERSHIP. 2.

—— Principal or agent—Receiver's remuneration—Priorities – – – – **365**
See COMPANY. 7.

RECONSTRUCTION — Company—Memorandum of association – – – **747, 823**
See COMPANY. 1, 5.

REDEMPTION—Conditions of proviso for—Construction—Foreclosure – – **804**
See MORTGAGE. 1.

—— Mortgagor and mortgagee — Accounts—Compound interest – – – **165**
See MORTGAGE. 2.

REDUCTION OF CAPITAL—Paying off capital in excess of company's wants—Procedure – – – – – – **141**
See COMPANY. 9.

REGISTRATION — Company — Shares — Negligence—Possession of certificates—Distringas – – – – – **659**
See COMPANY. 10.

REGISTRATION—*continued.*

—— Company — Shares — Refusal to register—Mortgage—Damages – – – **549**
See COMPANY. 11.

—— Money-lender, contract of unregistered—Validity – – – – – **740**
See MONEY-LENDERS.

REINVESTMENT—Costs—Apportionment **615, 619, n.**
See LANDS CLAUSES ACTS. 1, 2.

REMAINDERMAN—Tenant for life and.
See under SETTLED LAND.

REMOTENESS—Discretionary trust for maintenance—Validity – – – **624**
See WILL. 9.

REMUNERATION.
See under COSTS.

REQUISITION ON TITLE—Contract—Rescission—Arbitrary exercise of power to rescind contract – – – **596**
See VENDOR AND PURCHASER. 1.

RESCISSION—Conditions of sale—Misdescription — Absence of title to mines — Compensation – – – – **412**
See VENDOR AND PURCHASER. 2.

—— Contract—Requisition on title—Arbitrary exercise of power to rescind contract
See VENDOR AND PURCHASER. 1. **596**

—— House in London—Open contract—Adjoining house—Party-wall notice and award—Non-disclosure – – – **335**
See VENDOR AND PURCHASER. 4.

—— Sale under direction of Court—Costs recoverable by purchaser – – **426**
See VENDOR AND PURCHASER. 6.

RESERVOIR — Waterworks — Right to support minerals under adjacent lands – **278**
See MINES.

RESETTLEMENT — Condition requiring — "Hereditaments" — Money held upon trust for investment in land – **120**
See WILL. 5.

RESTRICTIVE COVENANTS.
See under COVENANT.

RETAINER — Trustee and cestui que trust — Right of retainer—Obligation to retain
See TRUSTEE. 3. **216**

REVENUE—*Estate Duty—Real and Personal Estate—Incidence of Duty—Lunatic entitled to both Real and Personal Estate—Payment of Duty on Realty out of Personalty—Surplus Rents—Charge in favour of Next-of-Kin—Heir-at-Law—Merger of Charge—Finance Act*, 1894 (57 & 58 *Vict. c.* 30) *s.* 6, *sub-s.* 2; *s.* 9, *sub-s.* 1.

H. by her will appointed D. her executor and trustee, but, in the events which happened, died in 1896 intestate as to her real and personal estate, leaving her brother, a lunatic, her sole next-of-kin and heir-at-law. D. was also committee of the lunatic. D. paid the estate duty in respect of both the real and personal estate out of the personal estate. The lunatic died intestate in 1903; his income was more than sufficient for his maintenance, the surplus rents of his real estate were accumulated during his life, and the accumulations were more than sufficient to have paid the amount of the estate duty attributable to the real estate. The lunatic's next-of-kin claimed to be entitled to a charge on his real estate for the amount of duty paid in respect thereof out of his personal estate:—

Held (affirming the decision of Farwell J., [1905] 2 Ch. 384) that, assuming the payment of the estate duty created a charge upon the real in favour of the personal estate, any charge which might have existed at the time of the payment of the duty on the realty out of the personalty in favour of the personalty was extinguished before the death of the lunatic: that as there was no interest in the lunatic requiring the charge to be kept alive, and, under the circumstances, no person who could require the charge to be raised, it had merged.

Held, also, that the case was covered by *Lord Compton* v. *Oxenden*, (1793) 2 Ves. Jun. 261. *In re* HOLE. DAVIES *v.* WITTS – – **C. A. 673**

—— Income tax—Company—Directors' fees
See COMPANY. 4. **148**

—— Income tax — Deduction of — Separation deed—Alimony—Annuity – – **768**
See DIVORCE.

—— Income tax—Duty of trustee to deduct—Annuity – – – – – **793**
See TRUSTEE. 2.

REVOCATION—Patent.
See under PATENT.

RULES OF SUPREME COURT:—Order XXV., r. 5—*Proceedings in lieu of demurrer*
See HIGHWAY. **342**
See PATENT. 5. **324**

—— **Order XXVIII., r. 11**—*Amendment* – **124**
See SOLICITOR. 2, 3.

—— **Order XLI., r. 5**—*Entry of Judgment*
See ATTACHMENT. 2, 3. **93, 692**

—— **Order XLII., r. 3**—*Execution* – **93**
See ATTACHMENT. 2.

—— **Order XLIV., r. 2**—*Attachment* – – **692**
See ATTACHMENT. 3.

—— **Order LI., r. 1** *B*—*Sales by the Court* – **523**
See COMPANY. 3.
See PATENT. 2. **518**

—— **Order LXV., r. 2; r. 19** *H*; **r. 27, sub-r. 38** *B*—*Costs* – – – – – **491**
See COSTS.

—— **r. 14** *D* – – – – – **762**
See ADMINISTRATION. 4.

SALE—Company—Motion for judgment on admissions in pleadings — Immediate sale – – – – – – **523**
See COMPANY. 3.

—— Copyholds—Death of vendor before completion—Fine on heir's admission **534**
See LANDS CLAUSES ACTS. 3.

SALE—*continued.*

—— Power of sale.
See under POWER OF SALE.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SATISFACTION—Debt due from testator at death —Legacy to creditor of larger amount
See WILL. 11. **667**

SCHOOLS—Dismissal of schoolmistress—Powers of manager – – – – **451**
See EDUCATION.

SEPARATION DEED — Alimony — Annuity — Deduction of Income Tax – – **768**
See DIVORCE.

SERVANT — Master and—Dismissal of schoolmistress—Powers of manager – **451**
See EDUCATION.

SERVICE — Trustee — Contempt—Disobedience of order to pay money—Service of order
See ATTACHMENT. 3. **692**

SETTLED LAND—*Leasing Powers—Occupation Lease—Two Estates included in One Settlement—Principal Mansion House—Consent of Trustees—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 6, 53—*Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 10, *sub-s.* 2.

The consent of the trustees of the settlement, required by sub-s. 2 of s. 10 of the Settled Land Act, 1890, to be given to the sale or lease of the principal mansion house on any settled land, need not be communicated to the parties.

Two estates, each of which included a mansion house, were settled by the same instrument to the same uses. The tenant for life, acting under the powers of the Settled Land Acts, leased one of the mansion houses to his wife. The evidence shewed that the lease was advantageous to all the parties entitled under the settlement. Each of the trustees of the settlement, with full knowledge of the facts relating to the proposed lease, approved of it as being for the benefit of the estate, but neither of them gave any formal consent thereto, each being advised that the house in question was not the principal mansion house on the settled land :—

Held—(1.) on the evidence, that it was not the principal mansion house; (2.) that if any consent to the lease was required the trustees had given their consent.

The meaning of "principal mansion house" discussed. GILBEY *v.* RUSH – **Kekewich J. 11**

2. —— *Tenant for Life — Will — Gift to Widow during Widowhood for the Maintenance of herself and her Children—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7 ; *s.* 58, *sub-s.* 1 (*vi.*).

A testator gave all his real and personal estate to trustees upon trusts, as to a certain piece of land and a public-house for his wife during widowhood, for the benefit and maintenance of herself and her children and the proper bringing up of the latter :—

Held, that the widow had the powers of a tenant for life under s. 58, sub-s. 1 (vi.) of the Settled Land Act, 1882, notwithstanding that her interest was charged with the maintenance

SETTLED LAND—*continued.*

of the children : *In re Theaker's Settled Estates* (Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 332) followed. *In re* POLLOCK. POLLOCK *v.* POLLOCK
Swinfen Eady J. 146

3. —— *Trustees for the Purposes of the Settled Land Acts—Power of Sale—Other Lands comprised in the Settlement—Lands purchased by Trustees and Settled to like Uses—Settled Land Act*, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 16.

M., who died in 1885, by will devised land to trustees upon trust for S. for life, then for his eldest son for life, and afterwards upon trusts corresponding to a strict settlement. He gave all his personal estate to the same trustees upon trust to invest in land, to be conveyed to them upon the same trusts as the land devised. He gave the trustees a power of sale over all the land except his mansion house and lands in the same parish.

The trustees had invested part of the personal estate in the purchase of lands which were conveyed to them upon the trusts of the will. They had afterwards sold all the lands originally comprised in the will other than those excepted from the power of sale. The equitable tenant for life had entered into a contract for the sale of the mansion house :—

Held, that the purchased lands were "comprised in the settlement, and subject to the same limitations, as the land agreed to be sold" within the meaning of the Settled Land Act, 1890, s. 16, sub-s. 1, and the trustees were trustees for the purposes of the Settled Land Acts. *In re* MOORE. MOORE *v.* BIGG.
Swinfen Eady J. 789

—— Licence—Compensation for non-renewal—Public-house—Deductions from rent
See LICENSING ACTS. **799**

—— Lunatic, Land vested in, as tenant for life —Committee—Power of sale – **712**
See LUNACY. 1.

SETTLEMENT—*Covenant to settle Wife's after-acquired Property — Marriage Settlement — Construction—Estate Tail.*

By a marriage settlement the intended husband and wife covenanted with the trustees of the settlement, that if during the coverture the wife, or the husband in her right, should become seised or possessed of, or entitled to any real or personal property for any estate or interest in possession, remainder or expectancy, the husband and wife and all other necessary parties would, as soon as circumstances would permit, convey, assign, settle and assure the said real or personal estate to the trustees for the time being of the settlement :—

Held, that an estate tail to which the wife became entitled in remainder during the coverture was not bound by the covenant.

Hilbers v. *Parkinson*, (1883) 25 Ch. D. 200, followed and approved. *In re* DUNSANY'S SETTLEMENT. NOTT *v.* DUNSANY – **C. A. 578**

2.—"*Survivors*" *read* "*Others*"—*Stirpital Survivorship—Settlement by Deed—Construction.*

In 1836 real estate was by deed settled upon trust for the six daughters and one son of A. f r

SETTLEMENT—*continued.*

their respective lives as tenants in common, with remainder as to the share of each tenant for life to his or her child or children who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry, and if more than one as tenants in common in fee; provided that if any one or more of the seven tenants for life should die without issue, or leaving issue and such issue being a son should die under the age of twenty-one, or being a daughter should die under that age without having been married, then the orignal as well as the accrued share of any such tenant for life should go and be equally divided between "the survivors and survivor" of them the said seven tenants for life and their, her and his issue respectively for such estates and interests and in such shares and proportions in all respects as the original shares of the seven tenants for life were directed to be divided: and there was an ultimate limitation to the settlor in fee if all the seven tenants for life died without leaving issue who should live to attain twenty-one or marry as aforesaid. Four of the tenants for life died without issue. Another married and died leaving one child, who attained twenty-one and afterwards died. Another married and died leaving several children, all of whom attained twenty-one, and some of whom were still living. One tenant was still living:—

Held, following *Cole* v. *Sewell*, (1843) 4 D. & War. 1; on appeal, (1848) 2 H. L. C. 186, that the same principles applied in construing a deed and a will.

Held, also, that the words "survivors and survivor" must be construed "others and other," and that all the children of tenants for life who respectively attained twenty-one acquired absolute vested interests, irrespective of whether they did or did not survive deceased tenants for life or the tenant for life who was still living.

In re Bilham, [1901] 2 Ch. 169, distinguished.

Waite v. *Littlewood*, (1872) L. R. 8 Ch. 70, and *Lucena* v. *Lucena*, (1877) 7 Ch. D. 255, discussed. *In re* FRIEND'S SETTLEMENT. COLE *v.* ALLCOT – – – **Farwell J. 47**

—— Power of appointment—Contingent remainder—Perpetuity – – – **783**
See POWER OF APPOINTMENT.

SHAREHOLDERS AND SHARES.
See under COMPANY.

SHIPPING—Harbour dues—"Limits of port"
See HARBOUR. **179**

SOLICITOR — *Costs — Practice — Taxation — Solicitor's Bill of Costs—Jurisdiction of Taxing Master—Substituting an Item—Correcting Error in Casting—Order XXVIII., r.* 11—*5l. Deposit on Presentation of Bankruptcy Petition—Bankruptcy Rules*, 1886, *rr.* 112 (1.), 125, 147—*Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37.

In taxing a bill of costs under the Solicitors Act the taxing Master has no jurisdiction to substitute, for an item admittedly not chargeable, an item properly chargeable but omitted from the bill; for that in fact is altering the bill, which can only be done on a proper application to the Court: *In re Walters*, (1845) 9 Beav. 299.

SOLICITOR—*continued.*

But he can correct an error in the casting of the bill, although it alters the amount, for that is not taxation, but arithmetic.

The 5*l.* deposit paid into Court under r. 147 of the Bankruptcy Rules, 1886, on the presentation of a bankruptcy petition is, by virtue of sub-r. 1 of r. 112 of the same Rules and the scale of costs thereunder, properly entered as a disbursement in a solicitor's bill of costs, and does not fall within the principle of *In re Buckwell & Berkeley*, [1902] 2 Ch. 596. *In re* GRANT, BULCRAIG & CO. – **Farwell J. 124**

—— Costs—Debenture-holder's action — Plaintiff's costs—Charging order – **271**
See COMPANY. 2.

—— Costs—Taxation—Reduction by one-sixth
See COSTS. **491**

SPECIFIC PERFORMANCE—Covenant to build
See LEASE. **34**

—— Judgment for specific performance against purchaser—Forfeiture of deposit—Form of order – – – – **796**
See VENDOR AND PURCHASER. 5.

—— Requisition on title—Arbitrary exercise of power to rescind contract – **596**
See VENDOR AND PURCHASER. 1.

SQUATTER—Restrictive covenants — Title by adverse possession—Notice—Statute of Limitations – – – – **386**
See VENDOR AND PURCHASER. 7.

STATUTE—Repealing Act—Saving clause, effect of—Trustee—Criminal lunatic—Vesting order – – – – – **730**
See LUNACY. 3.

STATUTES.

1670.

22 & 23 Car. 2, c. 10, ss. 6, 7—*Statute of Distribution* – – – – – **58**
See ADMINISTRATION. 3.

1792.

33 Geo. 3, c. xxiii.—*Port of Carnarvon* – **179**
See HARBOUR.

1807.

49 Geo. 3, c. xxiv.—*Port of Carnarvon* – **179**
See HARBOUR.

1817.

57 Geo. 3, c. xxix. ss. 80, 82—*Michael Angelo Taylor's Act* – – – – **299**
See LONDON.

—— —— ss. 80, 96 – – – – **464**
See STREETS.

1833.

3 & 4 Will. 4, c. 27, s. 34—*Real Property Limitation* – – – – – – – **386**
See VENDOR AND PURCHASER. 7.

—— —— s. 42 – – – – – **67**
See VENDOR AND PURCHASER. 8.

1842.

5 & 6 Vict. c. 35, ss. 102, 103—*Income Tax* **768**
See DIVORCE.

5 & 6 Vict. c. 45, s. 3—*Copyright* – – **101**
See COPYRIGHT.

STATUTES—*continued.*

1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* – – 124
See SOLICITOR.
—— —— ss. 37, 38 – – – – 491
See COSTS.

1845.

8 & 9 Vict. c. 18, s. 7—*Lands Clauses* – 712
See LUNACY. 1.
—— —— s. 80 – – – – – 615
See LANDS CLAUSES ACTS. 1.
—— —— s. 82 – – – – – 534
See LANDS CLAUSES ACTS. 3.
8 & 9 Vict. c. 20, ss. 16, 45—*Railways Clauses*
See LONDON. 508

1847.

10 & 11 Vict. c. 17, ss. 18–27—*Waterworks Clauses* – – – – – 278
See MINES.

1850.

13 & 14 Vict. c. 60, s. 5—*Trustees* – – 730
See LUNACY. 3.

1853.

16 & 17 Vict. c. 34, s. 40—*Income Tax* – 768
See DIVORCE.

1860.

23 & 24 Vict. c. 38, s. 13—*Law of Property* 265
See ADMINISTRATION.
23 & 24 Vict. c. 127, s. 28—*Solicitors* – 271
See COMPANY. 2.

1862.

25 & 26 Vict. c. 68, s. 1—*Fine Arts Copyright*
See COPYRIGHT. 2. 774
25 & 26 Vict. c. 89, s. 79—*Companies* – 841
See COMPANY. 15.
—— —— s. 133 – – – – – 1
See COMPANY. 16.

1867.

30 & 31 Vict. c. 69, s. 1—*Real Estate Charges*
See WILL. 6. 531
30 & 31 Vict. c. 131, s. 15—*Companies* – 141
See COMPANY. 1.

1869.

32 & 33 Vict. c. 62, s. 4—*Debtors* – – 697
See ATTACHMENT. 1.

1870.

33 & 34 Vict. c. 23, ss. 10, 12—*Forfeiture* – 440
See FELONY.
33 & 34 Vict. c. 93, s 10—*Married Women's Property* – – – – – 526
See HUSBAND AND WIFE.

1874.

37 & 38 Vict. c. 57—*Real Property Limitation*
See VENDOR AND PURCHASER. 7. 386
—— —— s. 8 – – – – – 25
See LIMITATIONS, STATUTE OF.

1877.

40 & 41 Vict. c. 26, s. 3—*Companies* – 141
See COMPANY. 9.

STATUTES—*continued.*

1882.

45 & 46 Vict. c. 38, s. 2, sub-ss. 5, 7; s. 58, sub-s. 1 (vi.)—*Settled Land* – 146
See SETTLED LAND. 2.
—— —— ss. 3, 62 – – – – – 712
See LUNACY. 1.
—— —— ss. 6, 53 – – – – – 11
See SETTLED LAND. 1.
45 & 46 Vict. c. 50—*Municipal Corporations*
See CORPORATION. 643

1883.

46 & 47 Vict. c. 57, s. 19—*Patents, Designs and Trade Marks* – – – – 85
See PATENT. 1.
—— —— ss. 26, 32 – – – – 324
See PATENT. 5.
—— —— s. 29, sub-s. 6 – – – – 518
See PATENT. 2.

1886.

49 & 50 Vict. c. 25, s. 5—*Idiots* – – 565
See LUNACY. 2.

1890.

53 & 54 Vict. c. 5, s. 116, sub-s. 1 (*c*)—*Lunacy*
See LUNACY. 2. 565
—— —— ss. 116, 120, 128 – – – 712
See LUNACY. 1.
—— —— ss. 136, 340, 342 – – – 730
See LUNACY. 3.
53 & 54 Vict. c. 39, s. 39—*Partnership* – 113
See PARTNERSHIP. 1.
53 & 54 Vict. c. 69, s. 10, sub-s. 2—*Settled Land*
See SETTLED LAND. 1. 11
—— —— s. 16 – – – – – 789
See SETTLED LAND. 3.

1893.

56 & 57 Vict. c. 53, s. 10, sub-s. 1—*Trustees* 435
See TRUSTEE. 1.
—— —— s. 13 – – – – – 684
See VENDOR AND PURCHASER. 3.
—— —— s. 25, sub-s. 1, and s. 26 – – 359
See COMPANY. 13.
56 & 57 Vict. c. 61, s. 1—*Public Authorities Protection* – – – – 342
See HIGHWAY.
56 & 57 Vict. c. cxcviii., ss. 4, 7, (i.) (iv.)—*North Eastern Railway (Hull Docks) Act*
See COMPANY. 6. 310
56 & 57 Vict. c. ccxiv., s. 31—*Charing Cross, Euston, and Hampstead Railway* 508
See LONDON. 1.

1894.

57 & 58 Vict. c. 30, s. 6, sub-s. 2; s. 9, sub-s. 1—*Finance* – – – – – 673
See REVENUE.
57 & 58 Vict. c. ccxiii., s. 5, sub-s. 31; s. 201, Part VIII.—*London Building* – 508
See LONDON.
—— —— ss. 90, 91, 98, 99 – – – 335
See VENDOR AND PURCHASER. 4.

1897.

60 & 61 Vict. c. 65, s. 1, sub-s. 1; s. 2, sub-s. 3—*Land Transfer* – – – – 446
See ADMINISTRATION. 2.
—— —— s. 1, sub-ss. 1, 3; s. 2, sub-s. 3 – 762
See ADMINISTRATION. 4.

STATUTES—*continued.*

1899.

62 & 63 Vict. c. cclix.—*Manchester Corporation Tramways* – – – – **643**
See CORPORATION.

1900.

63 & 64 Vict. c. 51, s. 2, sub-ss. 1 (*a*) (*c*), 2—*Money-lenders* – – – – **740**
See MONEY-LENDERS.

1902.

2 Edw. 7, c. 42, ss. 7, 17, Sched. I., A (6)—*Education* – – – – **451**

1904.

4 Edw. 4, c. 23, s. 3—*Licensing* – – **799**
See LICENSING ACTS.

STIRPITAL SURVIVORSHIP — "Survivors" read "others" – – – – **47**
See SETTLEMENT. 2.

STREETS — *Widening — Compulsory Powers—Adjudication—Notice to Treat for entire House —Prior Agreement to Re-sell Part not wanted for Widening—Owner's Right to Retain—Local Government—Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96.

A local authority entrusted by Michael Angelo Taylor's Act, 1817, with statutory powers to take land compulsorily for the purpose of widening streets must use them bona fide for the statutory purpose, and for none other. They have no right to seek to reduce the expense to the ratepayers by straining their powers in the interest of persons who desire to acquire the adjacent land from the owners of it. They are bound, under s. 80, to adjudicate whether any houses, and what part of any houses, are necessary to be taken for the improvement, and for this purpose they must form an honest judgment after consideration of all the facts of the case; otherwise their decision will not be binding.

Where a landowner desires to retain part of a house, the local authority cannot insist on taking the whole unless the remainder will be useless as a house. Whether that which is left will be a house or not is a question of fact to be determined in each case, and the circumstance that the part left will require some reconstruction is not conclusive evidence that it will not be a house.

Whether or not the power of a local authority to take the whole of a house ought to be measured by the wishes of the owner, the attitude which he takes up ought not to be disregarded: and if he desires to do upon his own land such work that that which is left will be a house regard ought to be had to that fact. J. L. DENMAN & CO., LIMITED *v.* WESTMINSTER CORPORATION; J. C. CORDING & CO., LIMITED *v.* WESTMINSTER CORPORATION
Buckley J. 464

—— Widening street—Power to take part of house – – – – – **299**
See LONDON.

SUBSTITUTIONAL GIFT TO ISSUE—Class—Issue of parent at date of will – **319**
See WILL. 4.

SUPPORT — Waterworks — Right to support from minerals under adjacent land **278**
See MINES.

SURPLUS ASSETS—Distribution among shareholders—Bankruptcy of shareholder—Proof – – – – – – **1**
See COMPANY. 16.

"**SURVIVORS**"—Settlement by deed—"Survivors" read "others" – – – **47**
See SETTLEMENT. 2.

TAXATION—Costs.
See under COSTS.

—— Solicitor's bill of costs.
See under SOLICITOR.

TAXES.
See under REVENUE.

TENANT FOR LIFE.
See under SETTLED LAND.

TITLE — Action for declaration of — Roadside waste — Dedication — Presumption — Evidence — Public authorities protection – – – – – – **342**
See HIGHWAY.

—— Conditions of sale—Trust for sale—Leaseholds—Trustee—Sale by way of underlease – – – – – – **684**
See VENDOR AND PURCHASER. 3.

TITLE DEEDS — Deposit — Partnership real estate — Executor's lien — Notice — Priorities – – – – – **113**
See PARTNERSHIP. 1.

TRAMWAYS — Manchester Corporation—Business of common carriers—Ultra vires
See CORPORATION. **643**

TRANSFER — Shares — Refusal to register — Mortgage—Damages – – – **549**
See COMPANY. 11.

TRUST—Express trust—Infant legatee—Duty of executor to give notice of legacy **25**
See LIMITATIONS, STATUTE OF.

TRUSTEE — *Appointment of New Trustee — Statutory Power—Power to appoint "another Person or other Persons"—Donee appointing himself—Invalid Appointment—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 10, *sub-s.* 1.

Under the statutory power of appointing new trustees conferred by s. 10, sub-s. 1, of the Trustee Act, 1893, the person making the appointment cannot validly appoint himself, either alone or jointly with any other person.

Montefiore v *Guedalla*, [1903] 2 Ch. 723, considered. *In re* SAMPSON. SAMPSON *v.* SAMPSON – – – – **Kekewich J. 435**

2. —— *Income Tax—Duty of Trustee to deduct —Trustee and Cestui que Trust—Annuity—Liability to replace Amounts paid in excess by not deducting the Tax.*

S. by will gave his real and personal estate to trustees upon trust to convert and invest, to pay certain annuities out of the income and accumulate the residue of the income until the capital became divisible (or for twenty-one years) and subject thereto to hold capital and income in trust for his grandchildren in equal shares. The

TRUSTEE—*continued.*

trustees invested the funds in such a manner that the income tax was always deducted before the income was paid to them. The successive trustees for over twenty years paid all the annuities in full without deducting income tax. Some of the trustees were also annuitants :—

Held, that the trustees were liable to make good to the trust estate the amount of income tax so overpaid to the annuitants.

Held, also, that s. 8 of the Trustee Act, 1888, applied, and the liability of the trustees was limited to payments made within six years, except in the case of sums retained for their own annuities. *In re* SHARP. RICKETT *v.* RICKETT – – – **Swinfen Eady J. 793**

3. —— *Retainer—Trustee and Cestui que Trust—Sole Surviving Trustee—Legal Personal Representative—Breach of Trust—Debt due to Trust Estate—Insolvent Estate—Right of Retainer—Obligation to Retain—New Trustees, Appointment of—Cestui que Trust, Rights of.*

The legal personal representative of a sole surviving trustee who has died insolvent and indebted to his trust estate, cannot, unless he has elected to act as trustee or is otherwise in the position of trustee, be ordered to exercise, in favour of the cestuis que trust, his right of retainer in respect of the debt.

H. appointed two trustees of her will, and declared that all the trusts and powers thereby reposed in them might be exercised by the survivor or his heirs, executors or administrators, or other the trustee or trustees for the time being. B., one of the trustees, survived his co-trustee and died insolvent, intestate, and having committed a breach of trust in respect of which his estate was indebted to the H. estate. B.'s widow took out administration to his estate, and then appointed new trustees of H.'s will under a power therein contained ; and from time to time, as portions of the H. estate came to her hands, she transferred them to the new trustees.

Judgment for the administration of B.'s estate having been pronounced in an action brought by a creditor, the new trustees applied by summons in the action for an order on the administratrix to exercise her right of retainer in their favour as trustees of H.'s will, she having declined to do so or to act in any way in the trusts :—

Held, that, as the administratrix was neither a trustee of the will nor had in any way accepted the trusts, she was not under any obligation to exercise her right of retainer in favour of the trustees or beneficiaries under H.'s will.

Whether, in any case, after the appointment of new trustees, the right of retainer continued to be exercisable, *quære*.

Fox v. *Garrett*, (1860) 28 Beav. 16 ; and *In re Owen*, (1889) 23 L. R. Ir. 328, disapproved.

Sander v. *Heathfield*, (1874) L. R. 19 Eq. 21 ; and *Re Faithfull*, (1887) 57 L. T. 14, distinguished.

In re Ridley, [1904] 2 Ch. 774, approved.

Decision of Buckley J. reversed. *In re* BENETT. WARD *v.* BENETT – – **C. A. 216**

TRUSTEE—*continued.*

—— Attachment—Contempt—Disobedience of order to pay money—Service of order *See* ATTACHMENT. 3. **692**

—— Breach of trust—Judgment for recovery of money—Four-day order – – **93** *See* ATTACHMENT. 2.

—— Company—Winding-up—Contract to sell assets — Leaseholds — Omission to assign—Dissolution of company – **359** *See* COMPANY. 13.

—— Conditions of sale—Title—Trust for sale —Leaseholds—Sale by way of underlease – – – – – – **684** *See* VENDOR AND PURCHASER. 3.

—— Lunatic, criminal—Form of vesting order — Stock — Repealing Act — Saving clause, effect of – – – **730** *See* LUNACY. 3.

—— Settled land. *See* under SETTLED LAND.

—— Vendor's lien—Unpaid purchase-money—Reversionary interest, sale of—Trustee purchaser – – – – – **67** *See* VENDOR AND PURCHASER. 8.

ULTRA VIRES — Company—Reconstruction — Memorandum of association — Unfairness – – – – – **747** *See* COMPANY. 5.

—— Manchester Corporation Tramways—Business of common carriers – – **643** *See* CORPORATION.

—— Railway company—Dock company—Amalgamation—Water—Supply to dock *See* COMPANY. 6. **310**

—— Railway company—Omnibus business—Passengers—Incidental powers – **811** *See* RAILWAY.

UNCERTAINTY—Children — Illegitimate children—Indication of intention — Class gift—Future children – – **542** *See* WILL. 2.

UNDERLEASE — Conditions of sale — Title — Trust for sale—Leaseholds—Trustee—Sale by way of underlease – – **684** *See* VENDOR AND PURCHASER. 3.

USER — Cul-de-sac — Dedication to public — Public user—Plan—Implied representation – – – – – – **253** *See* BUILDING SCHEME.

—— Company—Winding-up—Contract to sell assets—Leaseholds—Omission to assign *See* COMPANY. 13. **359**

VENDOR AND PURCHASER — *Conditions of Sale—Requisition on Title—Vendor "unwilling to remove or comply with"—Arbitrary exercise of Power to rescind Contract—Specific Performance.*

Freeholds were put up for sale by auction subject to conditions which stated that the vendor was a trustee for sale, and that if any

purchaser should make any objection or requisition which the vendor should be "unwilling to remove or comply with," the vendor might annul the sale. The abstract of title supplied to a purchaser shewed that the property was devised by the will of a testator, who died in 1858, upon trust for A. for life, and after her death upon trust for sale and division amongst her children, but if A. died without leaving a child the property was to be conveyed to B. and C. as tenants in common. In answer to the purchaser's requisitions, the vendor gave the date and place of A.'s marriage and the names, but not the addresses, of her children. The purchaser pressed for the date of birth of any one child of A. living at her death in order to obtain a certificate of birth to prove that the trust for sale had arisen. The vendor not having this information in his possession, although he knew the address of one child and the address of the solicitors who acted for the other children, declined for reasons stated to comply with the requisition, and rescinded the contract. In an action by the purchaser for specific performance :—

Held, that the requisition was reasonable, that under the circumstances the vendor's rescission was arbitrary and unreasonable, and therefore the purchaser was entitled to specific performance. QUINION *v.* HORNE

Farwell J. 596

2. —— *Conditions of Sale—Right to Rescind if Objection insisted on — Misdescription — Absence of Title to Mines—Compensation.*

A condition giving the vendor the right to rescind in the event of his unwillingness to comply with an objection to the title must not be considered as giving him an arbitrary power to annul the contract ; some reasonable ground for his unwillingness must be shewn. Before a vendor will be allowed to rescind, he must satisfy the Court that he entered into the contract in ignorance of some material fact or document, or under some mistaken notion that he was entitled to sell and could make a title ; there must be no failure of duty on his part, no element of shortcoming, and he must have omitted nothing which the ordinary prudent man, having regard to his contractual relations with other persons, is bound to do.

J. and others contracted to sell to H. a villa residence by a description wide enough to include the mines and minerals under it. The contract provided (clause 13) that if the purchaser should "insist on any objection or requisition as to title" which the vendors should "be unable . . . . or decline" to comply with, the vendors might rescind the contract ; and (clause 14) that any error or misstatement should form the subject of compensation. The vendors believed that it was well known in the district that the minerals were reserved. The purchaser having insisted on a requisition that the vendors' title to the minerals should be furnished, the vendors gave a notice purporting to rescind the contract under clause 13 :—

Held (affirming the decision of Buckley J., [1905] 1 Ch. 603, though on a different ground), that though the purchaser's objection was "an objection to the title" within the terms of clause 13, it was not an objection that the vendors could avail themselves of as a ground for rescinding the contract, having regard to the facts and their own conduct ; and that the purchaser was entitled, under clause 14, to a conveyance of the property with compensation in respect of the mines and minerals.

Bowman v. *Hyland*, (1878) 8 Ch. D. 588, discussed and explained. *In re* JACKSON & HADEN'S CONTRACT – – – **C. A. 412**

3. —— *Conditions of Sale—Title—Trust for Sale—Leaseholds—Sale by way of Underlease—Trustee Act*, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 13.

Trustees for sale put up for auction five leasehold houses, held under one lease, in five separate lots, subject to a condition that if all the lots were sold at the present sale, the purchaser of the largest lot in value should execute an underlease for the whole of the term, less one day, to the respective purchasers of the other lots at an apportioned rent ; but that if any of the lots remained unsold (which happened), "the vendors will grant to the purchaser or respective purchasers of the lot or lots sold such an underlease as aforesaid of each of the lots sold" :—

Held (reversing the decision of Warrington J.), a valid exercise of the trust for sale.

In re Walker and Oakshott's Contract, [1901] 2 Ch. 383, overruled on this point. *In re* JUDD AND POLAND AND SKELCHER'S CONTRACT

C. A. 684

4. —— *House in London—Open Contract—Adjoining House—Party Wall Notice and Award—Non-disclosure — Material Fact — Defect in Title — Obligation to Disclose — Rescission — Return of Deposit—Cost of investigating Title—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *ss.* 90, 91, 98, 99.

The service of a party-wall notice under the London Building Act, 1894, and the issue of the usual award throwing upon the owner the liability to contribute a proportion of the cost of the party-wall works when completed, are material facts which a vendor is under an obligation to disclose to an intending purchaser, inasmuch as they affect the purchase price and constitute a latent defect in the title to the property ; and non-disclosure, however innocent, will afford the purchaser sufficient ground for obtaining rescission of his contract, followed by return of the deposit with interest, and payment of the costs of investigating the title.

Stevens v. *Adamson*, (1818) 2 Stark. 422, followed. CARLISH *v.* SALT – – **Joyce J. 335**

5. —— *Practice—Judgment for Specific Performance against Purchaser—Default in Payment by Purchaser—Forfeiture of Deposit—Form of Order.*

Where judgment for specific performance of a contract for purchase of land has been given against the purchaser, and he fails to comply with the judgment, the vendor is entitled, if the contract contained a clause forfeiting the deposit, and giving the vendor power to proceed to a fresh sale, to an order declaring the deposit forfeited and for payment of any deficiency on a

VENDOR AND PURCHASER—*continued.*

fresh sale and costs instead of the usual order rescinding the contract. GRIFFITHS *v.* VEZEY **Swinfen Eady J. 796**

—— Lands Clauses Acts.

See under LANDS CLAUSES ACTS.

6. —— *Rescission — Sale under Direction of Court—Discharge of Purchaser from Contract—Vendor's Power to Rescind—Misrepresentation—Costs recoverable by Purchaser — Costs of Bidding.*

Where land is contracted to be sold subject to a condition empowering the vendor to rescind the contract in the event of the purchaser making any requisition which the vendor is advised not to comply with, and stipulating that the return of the deposit shall be accepted by the purchaser in discharge of all claims for costs or otherwise, and the Court accedes to an application by the purchaser to be discharged from his contract on the ground of misrepresentation, the vendor cannot avail himself of his power to rescind under the contract; and where the sale is under the direction of the Court the costs recoverable by the purchaser include, besides the costs of investigating the title and of the application, the costs occasioned by his bidding for and becoming the purchaser of the property. HOLLIWELL *v.* SEACOMBE - - - - **Kekewich J. 426**

7. —— *Restrictive Covenants—Negative Covenants—Title by adverse Possession—Squatter's Title—Trespasser—Twelve Years' Possession—Acceptance of less than Forty Years' Title—Notice—Statute of Limitations—Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 34—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57).

A negative covenant validly created, entered into by an owner of land with an adjoining owner, such as a covenant restricting the user of the land, binds the land in equity, as being in the nature of a negative easement: *London and South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch. D. 562, 583; and it can, therefore, be enforced against any subsequent owner of the land not being a bona fide purchaser for value of the legal estate without notice. Such a covenant is equally binding in equity upon land to which a squatter has subsequently acquired a statutory title by adverse possession against the owner and covenantor for twelve years under s. 34 of the Real Property Limitation Act, 1833, as amended by the Real Property Limitation Act, 1874; for the statutory "extinguishment" of the title of the dispossessed owner of the land has not the effect of destroying the covenant, the equitable right of the covenantee not being in any way affected by the statute, and consequently the covenantee can enforce the covenant against the squatter both before and after he has acquired his possessory title, and also against any subsequent owner of the land not being a bona fide purchaser for value without notice.

Neither a squatter who has acquired a good title by possession, nor a purchaser from him, is exempt from liability arising through his not insisting on and obtaining a full forty years' title. Therefore, if any purchaser under the squatter's possessory title chooses to accept less than a forty years' title, he is fixed with constructive notice of all such equities affecting the land as he would have discovered by reasonable inquiries under a title for the full period.

Thus, where, on a purchase for value of freehold land, the purchaser agreed to accept a title commencing with a possessory or squatting title acquired within forty years prior to the purchase, he was held to have constructive notice of restrictive covenants affecting the land entered into within the forty years by an owner before the squatter took possession.

Decision of Farwell J., [1905] 1 Ch. 391, affirmed.

In re NISBET & POTTS' CONTRACT **C. A. 386**

8. —— *Vendor's Lien — Unpaid Purchase-money—Personal Estate—Reversionary Interest, sale of — Trustee Purchaser — Trust Fund — Administration—Interest—Arrears, recovery of —Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 42.

The doctrine of vendor's lien for unpaid purchase-money is as applicable to a sale of personal estate—such as a reversionary interest in a trust fund—as to a sale of real estate; and accordingly an unpaid vendor of personal estate is entitled to all such remedies for enforcing payment of his purchase-money and interest as he would have been entitled to under an express mortgage or charge.

No Statute of Limitations is applicable to a charge on personal estate, whether by way of vendor's lien or otherwise: consequently the right to the recovery of the debt is not barred by lapse of time, and interest is recoverable for the whole period from the date on which the debt was incurred.

In 1874 a son, being entitled in reversion upon the death of his father to a trust legacy of 5000*l.* under a will of which the father was sole surviving trustee and executor, sold and assigned his reversionary interest to his father by deed absolutely for 1500*l.* The deed expressed that the 1500*l.* was paid as the consideration money by the father to the son, and a receipt for the money was indorsed on the deed, but in fact the money was never paid. In 1900 the father died, whereupon the son claimed a lien for the 1500*l.* upon the 5000*l.* legacy, which was then in the hands of the father's executors, together with interest from the date of the assignment:—

Held, that the son was entitled to enforce his claim on the grounds (1.) that the doctrine of vendor's lien on real estate was equally applicable to personal estate; (2.) that a vendor's lien on personal estate was not subject to any statutory or other bar; and (3.) that, the father having been in the position of trustee of the legacy as well as purchaser, his executors were bound, in due course of administration, to satisfy the son's claim out of the legacy.

Order for payment accordingly, including interest at 4 per cent. per annum from the date of assignment.

Davies v. *Thomas*, [1900] 2 Ch. 462, followed.

In re STUCLEY. STUCLEY *v.* KEKEWICH **C. A. 67**

VENTRE SA MÈRE—Children—"Born in my lifetime"—Divesting clause – **583**
See WILL. 1.

VESTED—Contingent or—Class—Gift over on death "without leaving any children"
See WILL. 3. **570**

VESTING ORDER — Company — Winding-up—Contract to sell assets—Leaseholds—Omission to assign—Dissolution of company – – – – – **359**
See COMPANY. 13.

—— Criminal lunatic — Trustee—Stock — Repealing Act—Saving clause, effect of
See LUNACY. 3. **730**

VOTING—"Personally or by proxy"—Poll—Power of chairman to direct manner of taking—Polling papers—Invalidity
See COMPANY. 12. **331**

WALL—Party-wall notice—Railway company
See LONDON. 1. **508**

WATER—Railway company—Dock company—Amalgamation—Water obtained from land acquired for purposes of railway—Supply to dock – – – – **310**
See COMPANY. 6.

WATERWORKS—Reservoir—Right to support minerals under adjacent land – **278**
See MINES.

WIDENING—Streets.
See under STREETS.

WIDOW—Tenant for life—Will—Gift to widow during widowhood for the maintenance of herself and her children – – **146**
See SETTLED LAND. 2.

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILL — *"Born in my lifetime" — Divesting clause—Child en ventre sa mère—Estate tail—Will—Construction.*

The general underlying principle of the long series of decisions on this subject is that for the purposes of devolution of property in connection with intestacies and wills, no distinction ought to be drawn between a child born at a particular time and a child at that time en ventre sa mère and subsequently born alive; and that with regard to wills they ought to be construed and given effect to without making any such distinction unless the context requires a distinction to be made.

Blasson v. *Blasson*, (1864) 2 D. J. & S. 665, unless founded upon the governing words of the particular will, is opposed to the general current of authority, and can no longer be supported.

A testator devised real estate in strict settlement to the first and second sons of his brother, who were alive at the date of the will, successively for life, with remainder to their first and other sons in tail, with remainder to the third, fourth, and other sons of his said brother successively in tail, but declared his intention to be that any third or other son born in his lifetime

WILL—*continued.*

should not take a larger interest than an estate for life, with remainder to his issue in tail male. The brother's third son was born three weeks after the testator's death. The first and second sons died without issue :—

Held (reversing the decision of Swinfen Eady J. [1905] 2 Ch. 301), that the third son's estate tail was cut down to an estate for life. VILLAR *v.* GILBEY - - - - **C. A. 583**

2. —— *Children — Illegitimate Children—Indication of Intention—Class Gift—Future Children—Uncertainty—Public Policy.*

In class gifts a will speaks from death, and therefore a bequest to a woman's future illegitimate children, born in the testator's lifetime, and not defined by reference to actual paternity, is not uncertain or contrary to public policy—*secus*, a gift by deed.

Occleston v. *Fullalove*, (1874) L. R. 9 Ch. 147, and *In re Hastie's Trusts*, (1887) 35 Ch. D. 728, followed.

Loveland bequeathed his residuary estate in trust for "Daisy Dorcas Wootton (otherwise Daisy Dorcas Loveland)" for life and after her decease in trust for "all her children living at my decease" who being sons should attain twenty-one or being daughters should attain that age or marry.

The testator made this will just before starting by himself for the East, and knowing that his niece Daisy Dorcas Wootton, who had married him in Scotland, and was still living with him in the belief that her marriage was valid by Scottish law, was expecting her first confinement. Her child was born twenty-two days after the date of the will. The testator, who was informed of the birth, died seven months later at Penang, without having seen the child :—

Held, that having regard to the surrounding circumstances, there was a sufficient indication on the face of the will to shew that the testator used the word "children" as including illegitimate children. *In re* LOVELAND. LOVELAND *v.* LOVELAND - - **Swinfen Eady J. 542**

3. —— *Class—Gift to a Class who Attain Twenty-one—Contingent or Vested—Gift over on Death "without leaving any children"—Child Surviving and Dying under Twenty-one—Intestacy—Will—Construction.*

A testatrix gave all her real and personal estate to trustees in trust for her children who attained twenty-one or married, and if more than one in equal shares, with a gift over to other persons in the event of her death "without leaving any children surviving me." There was one child, who survived the testatrix and died an infant :—

Held, reversing the decision of Buckley J., that the child did not take a vested interest at birth ; and, secondly, that the gift over did not take effect, and that there was an intestacy.

Per Romer L.J. : The observations of Malins V.-C., in *Kidman* v. *Kidman*, (1871) 40 L. J. (Ch.) 359, 360, that, in a case like the above, words referring to death "without any children" are equivalent to "without any such children," are founded on a misapprehension of the decision in *In re Wrangham's Trust*,

WILL—*continued.*

(1860) 1 Dr. & Sm. 358, and cannot be supported.

Walker v. *Mower*, (1852) 16 Beav. 365, approved.

In re EDWARDS. JONES *v.* JONES **C. A. 570**

4. —— *Class—Gift to Children as a Class—Substitutional Gift to Issue—Issue of Parent dead at date of Will—Residue—Will—Construction.*

A testator by his will gave legacies to the children of one of his sons, whom he described as "my deceased son." He gave the residue of his estate in trust for all or any of his children who should be living at his death and attain twenty-one or marry, "provided that in case any one or more of my children shall predecease me leaving any child or children living at my death, then such child or children of my deceased child shall take" their parent's share:—

Held, that the children of the son who was dead at the date of the will were not entitled to share in the residue.

Loring v. *Thomas*, (1861) 1 Dr. & Sm. 497, distinguished.

In re GORRINGE. GORRINGE *v.* GORRINGE **Joyce J. 319**

5. —— *Condition requiring Resettlement—"Hereditaments"—Money held upon Trust for Investment in Land—Will—Construction.*

G. by his will devised real estate to his son for life, with remainders over in strict settlement, and declared that the estate for life limited to his son was limited upon condition that he should enlarge the estate in tail male, or in tail, to which he was entitled under his grandfather's will, in all the hereditaments devised by that will, or subject to the limitations thereof, and resettle the same to the uses limited by the testator's will. By the grandfather's will large estates were devised to the testator for life, with remainder to his son in tail male, parts of which had been sold, and the purchase-moneys were, at the testator's death, in the hands of trustees subject to a trust for reinvestment in land:—

Held, that these moneys were included in the word "hereditaments" and must be resettled.

In re GOSSELIN. GOSSELIN *v.* GOSSELIN **Farwell J. 120**

6. —— *Exoneration—Contrary Intention—Direction to pay Debts, "except Mortgage on Blackacre"—Other Mortgages—Locke King's Acts—Real Estate Charges Act*, 1867 (30 & 31 *Vict. c.* 69), *s.* 1.

A direction to pay debts, "except mortgage debts, if any, on Blackacre," out of residue, implies that other mortgage debts are to be paid out of residue, and is a sufficient contrary intention within the Real Estate Charges Act, 1867, s. 1, to take the case out of the Real Estate Charges Acts (Locke King's Acts). *In re* VALPY. VALPY *v.* VALPY – **Swinfen Eady J. 531**

7. —— *Gift "to be equally divided between the children of A. and B."—Will—Construction.*

Testatrix directed one moiety of the proceeds of sale of her real estate "to be equally divided between the children of F. W. or J. W. or their heirs." F. W. and J. W. were nephews of the testatrix. F. W. had six children living at the death of the testatrix. For five years previous to the date of the will he had not lived with his family. J. W. had two children living at the death of the testatrix:—

Held, that the gift was to J. W. and the children of F. W., and that the division must be into moieties, one going to J. W. and the other to the children of F. W. *In re* WALBRAN. MILNER *v.* WALBRAN – – **Joyce J. 64**

8. —— *Investments—"Company"—Power to Invest in Stocks and Securities of Companies—Companies not registered in the United Kingdom—Will—Construction.*

A testator empowered the trustees of his will to invest moneys in (amongst other things) the "stocks, funds and securities (not payable to bearer) of any corporation or company, municipal, commercial or otherwise":—

Held, that the clause was not confined to the stocks, funds and securities of corporations and companies formed or registered in the United Kingdom.

The meaning of the word "company" explained. *In re* STANLEY. TENNANT *v.* STANLEY **Buckley J. 131**

9. —— *Maintenance—Discretionary Trust for Maintenance—Validity—Remoteness—Will—Construction.*

A testator by his will devised and bequeathed certain real and personal estate to trustees upon trust to apply the income thereof in such proportions and generally in such manner as to them in their absolute discretion should seem best for the support of his "son W. and his wife and children, or any of them," or to accumulate the same or any part thereof at their like discretion for the benefit of the children of his son who should become entitled to the corpus of the property under the trust thereinafter contained: and subject to such discretionary trust he directed his trustees to pay the income to his son during his life and after his decease to his widow during her life or widowhood, and after the death of the survivor to stand possessed of as well the corpus as the income upon trust for the children of his son who should attain twenty-one:—

Held, that the discretionary trust for maintenance was limited to the life of W., but if not so limited, was void for remoteness.

Head-note to *Gooding* v. *Read*, (1853) 4 D. M. & G. 510, corrected.

In re Wise, [1896] 1 Ch. 281, and *In re Watson*, [1892] W. N. 192, not followed. *In re* BLEW. BLEW *v.* GUNNER – **Warrington J. 624**

10. —— *"Monies owing to me at the Time of my Decease"—Gift of Sums on Deposit at Banks—Will—Construction.*

Moneys on deposit at a testator's bank, whether notice of withdrawal is or is not required in respect of the same, will pass under a bequest of "monies owing to me at the time of my decease." *In re* DERBYSHIRE. WEBB *v.* DERBYSHIRE – – – **Buckley J. 135**

11. —— *Satisfaction—Debt due from Testator at Death—Legacy to Creditor of larger Amount—*

WILL—*continued.*

No time fixed for Payment—Debt carrying Interest—Creditor appointed Executrix.

A testatrix gave to her sister R. a legacy of 400*l.*, and appointed her executrix. At the time of her death the testatrix was indebted to R. in the sum of 150*l.* which carried interest, and on which interest had been paid up to her death :—

Held, that neither the fact that the legacy was not payable until one year after the death, nor the appointment of R. as executrix, took the case out of the general rule, and the legacy was a satisfaction of the debt. *In re* RATTENBERRY. RAY *v.* GRANT – – **Swinfen Eady J. 667**

—— Legacy, action to recover—Duty of executor to give notice of legacy – – **25**
See LIMITATIONS, STATUTE OF.

—— Tenant for life—Gift to widow for widowhood for the maintenance of herself and her children – – – – **146**
See SETTLED LAND. 2.

WINDING-UP OF COMPANY.
See under COMPANY.

WORDS — "Born in my lifetime" – – **583**
See WILL. 1.

—— "Building owners" – – – **508**
See LONDON. 1.

WORDS —*continued.*

—— "Children" – – – – – **542**
See WILL. 2.

—— "Company" – – – – – **131**
See WILL. 8.

—— "Estate" – – – – – **762**
See ADMINISTRATION. 4.

—— "Hereditaments" – – – – **120**
See WILL. 5.

—— "Just and equitable" – – – **841**
See COMPANY. 15.

—— "Limits of port" – – – – **179**
See HARBOUR.

—— "Monies owing to me at the time of my decease" – – – – – **135**
See WILL. 10.

—— "Others" – – – – – **47**
See SETTLEMENT. 2.

—— "Principal mansion house" – – **11**
See SETTLED LAND. 1.

—— "Survivors" – – – – – **47**
See SETTLEMENT. 2.

—— "Without leaving any children" – **570**
See WILL. 3.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

BIBL. LONDIN